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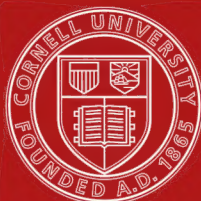
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A TREATISE
ON THE
LAW OF EASEMENTS.

BY
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OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

MUCH ENLARGED FROM THE SECOND ENGLISH EDITION OF 1877

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BOSTON:
HOUGHTON, MIFFLIN AND COMPANY.
The Riverside Press, Cambridge.
1880.

110679.

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The Riverside Press, Cambridge:
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PREFACE TO THE AMERICAN EDITION.

OF the English treatises on Easements, the best known to the American profession is probably that of Mr. Gale. Originally issued in 1839, and republished here in 1840, it has passed through five editions in England, the latest being in 1876. But these very facts furnish some reasons why it is not now the most desirable basis of an American work. The law is a progressive science, and much advancement is noticeable in the law of easements during the last forty years. Any book written from the standpoint then existing is not so well adapted to the present time as one more recently and freshly prepared. Besides, the work of Mr. Gale has, since his death, been revised by different successive editors, whose notes and additions have been prepared on quite different and not altogether harmonious plans, and the original text is now so overlaid with additions as to seem almost lost in the more extended commentaries thereon.

Mr. Goddard's treatise was first written in 1871, and reached a second edition in 1877. It has been declared by high judicial authority, Cockburn, C. J., in *Angus v. Dalton*, 3 Q. B. Div. 113, to be "a learned and able treatise." It discusses the subject in a natural and philosophical order, treating: First, of the definition and nature of Easements; second, of the various methods of acquiring them; third, of the mode and extent of their enjoyment; fourth, of their

disturbance, and the remedy therefor ; lastly, how they may be lost or extinguished.

Each of these topics is treated first, generally, as applicable to all easements ; and subsequently as it relates to each specific easement, in alphabetical order : viz., air, light, support, watercourses, and ways.

There is some liability to repetition in this method, but not more perhaps than when each branch is fully discussed by itself alone, since illustrations from other branches must even then be constantly resorted to.

Mr. Goddard's work has also the merit of confining itself strictly to the subject. He has not been led aside to discuss, except to distinguish, the law of Natural Rights, the right of *Profit à Prendre* ; nor even Licenses ; rights which, though much analogous to easements, cannot strictly be called such. It is, however, purely an English work, only a single American case, that of *Tyler v. Wilkinson*, 4 Mason, 397, being cited by the author.

In preparing this edition the undersigned has generally followed the plan of the original work ; the American law being sometimes interwoven into Mr. Goddard's text, and sometimes added in a separate chapter or section, as the subject seemed to require. In some important particulars the American law is quite different from the English, especially on the subject of prescription. We do not adopt the common law of England as to a prescriptive right to light and air, support of buildings, and the like ; nor do we have any statute analogous to the English statute of 1832, commonly called the Prescription Act, which has wrought great changes in the common law of England, but which has been declared to have "introduced greater doubt and confusion than existed before its enactment."

The modern English decisions on the subject of easements

by prescription having necessarily been largely controlled by the statute, it seemed proper to collect in this edition the common law decisions, and they are stated together in a section commencing on page 133. The American doctrine of acquiring an easement of light and air, both by implied grant and prescription, is quite fully presented on pages 192 to 210. The difference between the English and American law of support for buildings is also indicated at pages 231 to 236. About one hundred pages have been added to the body of the book, and over five hundred cases newly cited. It has not been thought necessary to accumulate all the American authorities upon well settled elementary points, and perhaps some have been improperly omitted; if so the undersigned would feel under obligations to any one informing him of the fact. The recent English cases have also been referred to, and those as well as the American are indicated by *figures*, while those of the author are denoted by *letters*. If this is objectionable it seemed less so than to disfigure the page by the use of brackets, and the additions of the editor may be sufficiently distinguished for all practical purposes by the simple device above noted. An entirely new and full index has been prepared by my friend, Mr. John E. Wetherbee, of the Suffolk Bar, to whom also I am much indebted for a careful reading of the proof-sheets, and other assistance.

EDMUND H. BENNETT.

Boston, July 1, 1880.

PREFACE.

ON the publication of the second edition of this treatise I may be permitted again to refer to my original work on the law of easements, as it was from that the present book took its origin. In the year 1867 I was appointed by the late Digest of Law Commissioners to prepare one of the three specimens of digests they were desirous of having made, in order to test the practicability of making a digest of the whole law of England, and to ascertain the best form and mode of executing that great work. The three subjects upon which the Commissioners determined to perform their experiment were Bills of Exchange, Mortgages, and Easements, and the subject on which I was appointed to write was Easements.

To prepare this specimen digest I made a complete search through the whole of the common law and equity reports from the time of Queen Elizabeth to the then present date, the number of volumes being upwards of eight hundred ; each case I found on the subject was carefully read, and, with notes of its subject-matter, registered, and I wrote my specimen digest from the materials thus collected. On the completion of my work the Commissioners made their report, in which they recommended that the digest of the English law should be proceeded with. As there were no signs of this recommendation being immediately carried out, and as the speci-

men digests were not published as it was expected they would be after revision by the Commissioners, I determined to write the present treatise on the subject to which I had devoted so much attention. I adopted the same general plan for my book that I had used for my specimen digest, as I believed it embraced the whole subject of the law of easements, and yet did not admit collateral topics, a fault to which I cannot but think some text-books have a tendency. The form of the text was necessarily changed, but the divisions into chapters and sections were retained. Thus the whole subject will be found divided into five chapters, explaining — first, the nature of easements ; secondly, the various modes of acquiring them ; thirdly, their extent and mode of user ; fourthly, their disturbance and the remedies appointed by law for such injuries ; and fifthly, their extinction, suspension, and revival. As, however, many principles of law apply to easements of all kinds, but some apply only to easements relating to the air, light, support, water, or ways, it was necessary to divide each chapter into two parts or sections, one relating to easements generally, and the other to these special kinds of easements, and in the second section of each chapter to treat of each of these particular easements separately. This will explain the arrangement of my work.

Though I believe the arrangement adopted enabled my book to embrace the whole subject of easements, it has been my endeavor to avoid wandering into collateral topics. This has been one great aim I had in view, both when I wrote for the Digest of Law Commission and also when I composed this work ; but it was frequently difficult to know where exactly to draw the line to mark the proper limits of deviation, and yet to keep from straying into by-paths, for there are many rights of a character closely allied to easements — for instance, *profits à prendre* and highways, — and many wrongs

to which disturbance of easements has a tendency to lead — as trespass and nuisances, — which hold out strong inducement to wander from the straight path and say something of those other matters in passing. The very favorable reception which my work has met with, although the ground on which it treads was already occupied by another treatise of acknowledged merit, leads me to think I did not do wrong in framing my work on the plan I adopted.

It remains for me merely to add that all the cases which have appeared in the Law Reports, or the Law Journal Reports, up to the end of 1876, are included in this edition, and two or three cases more recently reported have been introduced as the book was going through the press; and for every case cited a reference has been given to the Law Journal Reports, if the case is reported there, in addition to the reference to the regular series, or to the Law Reports, in which the same case appears. It may also be added that the new method of citing the Law Reports appointed since the formation of the High Court of Justice has been adopted.

J. L. G.

2 HARCOURT BUILDINGS, TEMPLE.

March, 1877.

TABLE OF CONTENTS.

CHAPTER I.

ON THE NATURE OF EASEMENTS.

SECT. 1. — *On the Nature of Easements generally.*

	PAGE
Misuse of the word "Easement"	1
Definition of "Easement"	1
"Natural Rights"	2
"Licenses"	3
An easement is a <i>privilege</i>	4
Without <i>profit</i>	6
No easements in gross	7
Not universally true in America	10
"Dominant" and "Servient" tenements and owners	11
Dominant and servient tenements <i>distinct</i>	11
Easements <i>beneficial</i> to dominant tenement	14
No easement for benefit of servient tenement	16
Obligation on servient owner to suffer or refrain from doing something	17
Customs	18
New species of easements	21
Easements adverse to natural rights	23
Inconsistent easements	24
Subordinate easements	25
Easements of necessity	25
When easements of necessity are permitted	26

SECT. 2. — *On the Nature of Particular Easements.*

AIR.

Rights in connection with air	28
Free passage of air	28
Purity of air	29
Right to pollute air	29
Limit of the natural right to purity of air	29
Pollution of air, when justifiable	30

	PAGE
LIGHT.	
Light, air, and water compared	31
Right to open windows to admit light and air	32
Right to have light and air unobstructed	33
Right to light and air is an easement	33
SUPPORT.	
Natural right to support	34
Nature of the natural right to support	34
Natural right to support is absolute and unlimited	35
What is adjacent land	36
Deprivation of natural right to support by statute	37
Effect on natural right to support of building and excavating	38
Support from underground water to surface land	39
Support from underground water to surface water	40
Easement of support for buildings	41
Easement of support for excavated land	43
Effect of contiguity of buildings	43
Right to deprive land of support	44
WATER.	
Easements in connection with water	48
Natural and artificial streams	48
Water from a natural source in a natural course	48
In an artificial course	48
Artificial supply to natural stream	51
Natural rights and easements in water	51
" Riparian " land, owners, proprietors, and rights	52
Riparian rights incident to the whole riparian estate	52
Partition of a riparian estate	53
Grant of riparian rights	53
Intermittent streams	53
Obligation of landowner at the source of a stream	54
Course of stream must be known and defined	54
Natural right to the flow of water	56
Natural right altered by easements	56
Wright v. Howard	57
Right to have streams diverted	53
Diversion of flood-water	59
Diversion of the flow of the sea	59
Obligation to maintain sea-walls	59
Tidal rivers	60
Right to pour water over land	61
Flow of underground water	61

	PAGE
Acton v. Blundell	62
Water collected in a well	64
Underground water affecting surface streams	66
Natural right to purity of water	67
Purity of water trickling over land or percolating through the soil	68
The right to take water for use	69
Natural right to use water	69
Limit to natural right to use and consume water	70
Nature of the right to take water	70

WAYS.

No natural rights of way	72
Public and private ways	72
Effect of rights of way on rights of landowner	73
Coexisting rights of way	75
Public way over preëxisting private way	75
Ways of necessity	76
Rights of way, general or limited	77

MISCELLANEOUS RIGHTS.

Attempts to create new species of easements	77
Uninterrupted prospect	79
View of a shop-window	82
Undisturbed privacy	84
Obstructing bow windows	84

CHAPTER II.

ON ACQUISITION OF EASEMENTS.

SECT. 1. — *On Acquisition of Easements generally.*

Distinction between easements and natural rights	86
Modes of creation and acquisition of easements	87
Easements must be created by deed, actual or presumed	88
Covenants by landowners	89
Breach of contract for an easement not under seal	90
Grant of licenses by parol	90
Implied from acquiescence	91
Implied from surrounding circumstances	92

ACQUISITION OF EASEMENTS BY GRANT.

Acquisition by grant, express or implied	92
--	----

	PAGE
Grant by one tenant to another	93
Derogation from grant by preventing an easement	94
Estoppel from denying an easement	95
Easements may be granted for a limited time	96
Acquisition by express grant	96
Express grant by particular description	97
Express grant by general words	97
"Appurtenances"; what will pass by the word	98
What will not pass	100
When <i>quasi</i> -easements will pass under general words	102
Grant of easements "used and enjoyed"	103
Easements first "used and enjoyed" during unity of ownership	103
Modification of the rule	104
Result of authorities as to grants by general words	107
The word "grant" not essential	108
Easements excepted or reserved in a conveyance	108
Grant at variance with an act of parliament	109
Grant subject to a condition	109
Implied grant of easements	109
Implied grant of easements necessary to render a grant beneficial	109
Grant presumed from surrounding circumstances	111
Presumption of lost grant after twenty years' user	111
User must have been as of right	113
Ignorance of user rebuts a presumption of a grant	113
Surrounding facts to be considered in conjunction with continuance of user	114
Effect of an old agreement on presumption	115
Implied grant of apparent and continuous easements	115
Cases considered : <i>Pyer v. Carter</i>	115
<i>Ewart v. Cochrane</i>	117
<i>Worthington v. Gimson</i>	117
<i>Pearson v. Spencer</i>	117
<i>Polden v. Bastard</i>	118
<i>Watts v. Kelson</i>	118
<i>Suffield v. Brown</i>	118
<i>Crossley v. Lightowler</i>	119
Result of the authorities	119
The American authorities	120

ACQUISITION OF EASEMENTS BY VIRTUE OF AN ACT OF PARLIAMENT.

Acquisition under a statute	128
By express terms, or the apparent intention of the act	128
Grant under a statute immediate or conditional	129
Public highways	130

	PAGE
Private ways	130
Railroads	130
Turnpike companies	131

ACQUISITION OF EASEMENTS UNDER A DEVISE.

Acquisition under a devise	131
--------------------------------------	-----

ACQUISITION OF EASEMENTS BY PRESCRIPTION.

Acquisition by prescription	131
Nature of prescription at common law	132
Immemorial usage	132
Presumption after twenty years' usage	132
Presumption of grant	132
Prescription in America	133
Must be adverse	134
Conclusiveness of prescriptive right	136
The Prescription Act	136
Section 2. — Ways, watercourses, and other easements	137
Section 3. — Light	137
Explanations of sections 2 and 3	138
Custom	138
"Way"	138
"Or other easement"	138
Uninterrupted flow of air	138
Support	140
Pollution of air	140
Easement claimed to obtain a <i>profit à prendre</i>	142
"Watercourse"	142
"Use of water"	142
Light	142
Actual enjoyment	143
Effect of the Prescription Act on prescription at common law	144
Legalization of previous user when an easement is acquired	145
Claims to prescriptive rights by owners in fee and occupiers of land respectively	145
Rules for computing prescriptive periods under the act	146
Section 4. — Periods to be computed from "some suit or action"	146
Not from the commission of an adverse act	147
Meaning of <i>some suit or action</i>	147
User must be <i>next</i> before some suit or action	148
No such rules at common law	149
Section 6. — No presumption of user to be made	149
Presumption not prohibited when evidence of an actual grant exists	151
Section 7. — Disability of persons interested in resisting prescriptive user	152

	PAGE
<i>Section 8. — User during terms of life or years in the servient tenement</i>	152
“ Other convenient watercourse ”	152
Intervention of life estate, computation of period	153
Continuity of period. Exclusion of period of disability	153
Exclusion of terms for life and years, under <i>section 8</i> , when computing periods of forty years	154
The character of the user the same at common law and under the statute	154
No prescription at variance with a grant	155
No prescription at variance with a prescriptive right	156
Prescription at variance with a natural right	157
Prescription possible only when a grant can be presumed	157
Easement must have been capable of being granted	158
No prescription adversely to a statute	159
No prescription if servient owner incapable of resisting user	160
The power to resist must be by reasonable means	161
Incapacity of servient owner to make a grant	162
Incapacity of dominant owner to take by grant	163
The time at which incapacity must exist in order to defeat prescription	164
No prescription if servient owner is ignorant of user	165
No prescription unless dominant and servient tenements, and the subject of an easement, are permanent	166
Prescriptive user must give title against all persons	167
User must have been “ as of right ”	169
Prescription Act : — user “ as of right,” — “ claiming right thereto ”	169
Bright <i>v.</i> Walker	170
Tickle <i>v.</i> Brown	170
User must not be by permission or by stealth or precarious	172
User must be peaceable	172
Interruptions evidence against peaceable enjoyment	173
Privilege must be enjoyed in the character of an easement	173
User must be uninterrupted and continuous	174
Interruptions of three kinds	175
(a) <i>As of right</i>	175
(b) <i>As an easement</i>	176
(c) <i>In fact</i>	177
Interruptions <i>in fact</i> as at common law	177
Non-user	177
Partial interruption of user	177
Trifling and accidental interruptions	178
Suspension of user by agreement	178
Interruptions <i>in fact</i> under the Prescription Act	178

	PAGE
Voluntary cessation of user, and user by permission	179
Acquiescence in interruption	180
Interruption during tenancy for life	180
By dedication or public prescription	180

ACQUISITION OF EASEMENTS UNDER A CUSTOM.

Easements claimed both by prescription and under a custom	184
Claims by custom under the Prescription Act	185
Must be reasonable and certain	185

SECT. 2. — *On Acquisition of Particular Easements.*

AIR.

Two kinds of easements	186
Uninterrupted flow of air	186
Prescriptive right	187
Prescription Act	187
Common law	187
Right to pollute air	188
Implied grant	188
Prescriptive right	188

LIGHT.

Acquisition of right to uninterrupted light and air	189
No grant implied from suffering windows to be opened	190
When a grant is implied	191
Sale of house reserving adjoining land	191
Sale of land reserving house	191
Sale of house and land simultaneously	192
The American law	192
Covenant for quiet enjoyment	202
Right by prescription at common law	202
Prescription Act	210
"Actual enjoyment"	210
Ancient custom of London	210
Prescriptive rights to light now depend solely on the statute	211
Doubts whether prescriptive rights now depend solely on the statute	212
Enjoyment "as of right"	213
Capability of resisting enjoyment	215
Enjoyment in character of an easement	215
Light to open ground	216
Light to shop-windows	216
Extraordinary light for special purposes	217
Light increased by reflection	219
American Prescription Acts	220

SUPPORT.		PAGE
Easements of support		220
How acquired		221
Implied grant on sale of land reserving subsoil		221
Implied reservation on grant of subsoil reserving the surface land		222
Mining leases		223
No right by custom or prescription to destroy support		224
Railway Clauses Consolidation Act		225
Support from underground water		226
Support for buildings		227
Right by implied grant		227
Party walls		228
Right by prescription		229
How can a grant be presumed ?		230
The American rule		231
No prescriptive right to support from buildings		236
WATER.		
Acquisition of water rights		240
By grant		240
By prescription		240
Streams and pools must be defined and permanent		241
Prescriptive rights in artificial streams		242
Temporary and permanent streams		243
Prescriptive rights in temporary artificial streams		244
Arkwright v. Gell		244
Prescriptive rights in permanent artificial streams		247
Right to flow of underground streams		247
Diversion of streams		249
Right to pen back the water of streams		249
Pouring water over land		250
Drip of caves		251
Effect of appropriation of flowing water for particular purposes		251
Appropriation of water in a well		252
Purity of water		253
Right by appropriation to purity of artificial streams		254
Whaley v. Laing		254
Wood v. Sutcliffe		257
Acquisition of right to pollute streams		258
Pollution gradually increasing		258
Goldsmid v. Tunbridge Wells Improvement Commissioners		259
Right to take water for use		261
Acquisition by grant or prescription		262

WAYS.

PAGE

Ways, how acquired	263
Ways by prescription	263
Grants by general words	263
Grant of ways shown in plans	264
The American law	265
Ways of necessity	266
Ways of necessity only when there is no other way	268
For a way of necessity a grant must be presumed	268
The American law	269
By statute	272

CHAPTER III.

ON THE EXTENT AND MODE OF USER OF EASEMENTS.

SECT. 1.—*On the Extent and Mode of User of Easements generally.*

Limit and mode of user of easements	274
Measure of easements granted by deed	275
Construction of grants most strongly against the grantor	277
Grant partly at variance with an act of parliament	278
Prescription partly at variance with an act of parliament	279
Measure of easements acquired by prescription	279
Easements do not hinder the consistent use of land	280
Increase of enjoyment by altering a dominant tenement	280
Right to obstruct excessive user	281
Assignment of easements	283
Repair of the subject of an easement	285

SECT. 2.—*On Extent and Mode of User of Particular Easements.*

AIR.

Purity of air	286
-------------------------	-----

LIGHT.

Extent of prescriptive rights to light	286
Extent of rights to light acquired by grant	289
Enlarging the size or increasing the number of windows	290
Altering and improving the condition of windows	291

SUPPORT.

Natural right to support unlimited	292
Natural right to support modified by agreement	294

Limited support for buildings	294
Obligation and right to repair a supporting building	294

WATER.

Limit of natural rights to the use and flow of water	296
Use of water	296
Ordinary and extraordinary use	297
Cutting ice	298
Riparian right to irrigate land	300
Irrigation in America	301
Use of water for manufacturing purposes	302
Prescriptive right to divert part of a stream	302
Extent of prescription to flow	302
Measure of prescriptive right to pollute a stream	307
Pollution by particular means	309
Pouring dirty water over land in excess of right	309
Partition of riparian land	310
Assignment of riparian rights	310
Easements by grant	311

WAYS.

Rights of way, general or limited	314
Measure of right of way granted by deed	314
Measure of right of way acquired by prescription	316
Rights of way of necessity coextensive with the necessity	319
Alteration of place of access to a way	320
Rights of way to be used only in connection with the dominant tenement	321
Ackroyd v. Smith	321
The occupier of a dominant tenement and his licensees alone to use a way	324
User of way to a place beyond the <i>locus ad quem</i>	324
Right of way to a highway	328
Right to build over ways	329
Gates and bars on private ways	330
Decreasing the width of private ways	332
Partition of a dominant tenement	337
Way becoming impassable; right to deviate	340
Way periodically interrupted; right to deviate	340
Interruption from extraordinary cause; right to deviate	341
Destruction of road; right to deviate	341
Want of repair; right to deviate	342
Grounds of the rule	343
Not taking private property	344

	PAGE
Right limited by the necessity	344
Obstruction by grantor; right to deviate	345
Right to repair a way	346
Direction of ways	346
Direction of ways of necessity	348
Variation of direction of ways of necessity	350
Grant for a continuing purpose. — Variation of mode of user	351
Power to make ways to be exercised reasonably	352

CHAPTER IV.

ON DISTURBANCE OF EASEMENTS AND ON LEGAL REMEDIES FOR THE SAME.

SECT. 1. — *On Disturbance of Easements generally, and on Legal Remedies for the Same.*

Right of freedom from disturbance	354
Actual damage requisite for cause of action in certain cases	355
Absence of damage within time limited for commencing actions	355
Damage must be substantial	356
Slight damage by many persons	356
Disturbance of easements an injury to the right, which gives a cause of action	356
Right to sue for disturbance of natural rights in the absence of actual damage	357
Right of action when occupier of dominant tenement alone disturbed	358
Right of action by reversioner	359
Right of action for continuing a disturbance	360
Breach of contract for an easement	360
Justification for obstructing an easement when obstructing an encroachment	362
When the court will restrain disturbance by injunction	363
Damages — when awarded formerly by the Court of Chancery	365
Injunctions in America	366

SECT. 2. — *On Disturbance of Particular Easements, and on Legal Remedies for the Same.*

AIR.

Right of action for obstruction of air	369
Free passage of air and light distinguished	369
Injunctions to restrain obstruction of air — when granted	370
Right of action for pollution of air	370
Pollution must be unjustifiable	371
Polluting air previously impure	372

	PAGE
Coming to a place where the air is polluted	372
Unavoidable pollution by carrying on trade	373
Hole <i>v.</i> Barlow	374
Bamford <i>v.</i> Turnley	375
Judgment of Pollock, C. B., in Exchequer Chamber .	376
Judgment of Bramwell, B.	376
Judgment of majority of the court	376
St. Helen's Smelting Company <i>v.</i> Tipping	379
Result of authorities	379
Public nuisances	381
Right of reversioner to sue for pollution of air	381
Acquiescence in pollution of air	382

LIGHT.

Right of action for obstruction of light	382
Restraint of obstruction by injunctions	383
Right by implied grant on sale — obstruction	384
Justification for obstructing light	385
Sufficient light for present purposes	386
Substitution of new stream of light in a different direction . .	386
Position of obstructing building	387
Enlargement of ancient lights and opening new windows . .	387
Renshaw <i>v.</i> Bean	388
Hutchinson <i>v.</i> Copestake	389
Tapling <i>v.</i> Jones	390
Action by reversioner	394
Application for injunction by a person with limited interest .	396
Right of action against a tenant for obstructing light	397
Substantial injury requisite to support an action	397
Covenant for quiet enjoyment. — Proof of substantial injury . .	399
Light prevented falling at angle of 45 degrees; substantial injury	400
Possibility of future injury	401
Right to abate obstruction of light	406
In America	407

SUPPORT.

Right to sue for disturbance of natural rights to support	409
Effect of erecting buildings	409
In America	410
Right to sue for disturbance of support to buildings	413
Effect of increasing the weight of buildings	414
Right of action against a wrong-doer for removing support . .	415
When a cause of action for removal of support accrues	416
Bonomi <i>v.</i> Backhouse	417

	PAGE
Time to sue if it is limited from the commission of an act	420
Lands and Railways Clauses Acts.—Right to sue for disturbance of support	421

WATER.

Disturbance of water rights	422
Damage necessary to support an action for obstructing and diverting a stream	423
The American law	425
Water diverted from a stream returned thereto	426
Obligation to keep a stream free from obstruction	427
Obstruction before the possession of a person who sues	427
Right of action for continuing the obstruction of a stream	427
The American law	428
Right to abate obstruction of streams	429
Disturbance of the steady flow of a stream	429
Disturbance of the right to take water for use	432
Right of action for pollution of water	434
Previous pollution no justification for fouling water	435
Pollution of a stream by carrying on trade not justifiable	436
When the court will restrain pollution of water	436
Restraint of drainage of towns if streams are polluted	437
The American law	438
Riparian owners must prove injury in that character	438
Pollution of underground water	439
Right of action for pollution in the absence of right to use water	439

WAYS.

Plaintiff's own wrong	443
No right of action for neglect to repair a way	443
Action by reversioner for obstruction of a way	444
Temporary obstructions.—Right of action	444
Obstruction of a private way over a public road	445
Obstruction of a private way by an obstacle in a public road	446

CHAPTER V.

ON EXTINCTION, SUSPENSION, AND REVIVAL OF EASEMENTS.

SECT. 1. — *On Extinction, Suspension, and Revival of Easements generally.*

Extinction and suspension of easements and natural rights	447
Extinction of easements	449
By act of parliament	450

	PAGE
Extinction by operation of law	451
Completion of the purpose of a grant	451
Extinction of easements of necessity on termination of the necessity	452
Extinction on alteration of a dominant tenement	452
Alteration must be material	453
Trifling alteration	455
Extinction on union of seisin	457
Necessity for union of seisin	458
Seisin must be for estates in fee simple	459
Unity of possession and enjoyment not necessary	460
Extinction by the act of the owner	460
Release and abandonment	460
Non-user alone insufficient evidence of release	461
Release when presumed on cessation of user	462
Cases in which non-user is the only evidence of abandonment . .	464
Abandonment presumed after non-user for less than twenty years .	465
Release or abandonment, when possible	466
Temporary agreement to suspend user	467
Substitution of new method of enjoyment	467
Right of dominant owners to abandon easements	468
Licenses	469
Revocable and irrevocable licenses	469
Execution of a work of a permanent and expensive character . .	471
In America	472
Revocation by adverse act of the grantor	474
Revival of easements and natural rights	475

SECT. 2. — *On Extinction, Suspension, and Revival of Particular Easements.*

Loss by abandonment	477
Release presumed after less than twenty years' non-user	478
Effect of altering size or position of windows	480
Effect on rights acquired by grant	480
Effect on rights acquired by prescription	481
Non-user	482
Restoration of ancient lights in new buildings	483

SUPPORT.

Effect on rights to support of imposing additional weights . . .	484
Effect on a natural right	484
Effect on an easement of support	485

WAYS.

Extinction on creation of public ways	485
Ways of necessity cease with the necessity	486

TABLE OF CONTENTS.

XXV

	PAGE
The American law	487
Extinction on union of seisin	488
Revival of right on severance	488
Ways becoming inaccessible	491

APPENDIX.

The Prescription Act; 2 & 3 Wm. 4, c. 71	493
--	-----

INDEX	497
-----------------	-----

TABLE OF CASES CITED.

A.		
ABBOTT, Spaulding v.	99, 100	Ames, Bardwell v. 58
v. Stewartstown	452, 487	Amidon v. Harris 10
v. Weekly	19	Amoskeag Man. Co., East-
Abson v. Fenton	110, 352	man v. 428
Absor v. French	343	v. Goodale 429
Ackroyd v. Smith 8, 10, 15, 22, 73,		Anderson v. Buchanan 271
321		Daniel v. 13
London & North West-		Andover, Proctor v. 272
ern R. R. v. 226, 422		Andrews, Canny v. 451
Acton v. Blundell 62, 64, 248, 253		Salisbury v. 330, 335
Adams v. Emerson 6, 73, 130		Androscoggin Bridge v. Bragg 472
Kilburn v. 132, 134		Angier, Bannon v. 277, 351, 464, 489
Smith v. 253		Angus v. Dalton 135, 140, 161, 221,
v. Van Alstyne 79		229, 233, 235
v. Walker 242		Anonymous 314
Adamson, McNab v. 250, 302		Anthony v. Lapham 301
Oakley v. 96		Appleton, United States v. 121, 193,
Aire & Calder Nav. Co., Reg. v. 422		208
Albro, Huttemeier v. 99		Appleyard, Bailey v. 7, 142
Alcock, Booth v. 191		Appold, Mayor of Baltimore v. 296
Alden, Weston v. 301		Arcedeckne v. Kelk 397
Alder v. Savill 305		Ardley v. St. Pancras Guardi-
Alderson, Houpes v. 331		ans 77, 96, 314
Aldred's case 25, 79, 157, 369, 371,		Arkwright v. Gell 61, 139, 161, 167,
434, 443		244, 251
Alexander v. Kerr 425		Armory v. Delamirie 443
Alger, Howe v. 96, 265, 266		Armstrong, Bentz v. 241
Allan v. Gomme 317, 453		Arndt, Shields v. 243, 367
Allard, Jacobs v. 239		Arnett, Lacy v. 307, 474
Allen v. Fiske 474		Arnold v. Blaker 181, 314, 341
v. Kincaid 271		v. Cornman 450
Mayor of Birmingham v. 36		v. Holbrook 314, 341, 343
v. Ormond 76, 445		v. Jefferson 397, 406
Alley v. Carleton 270, 452		Lyman v. 130
Allis v. Moore 165		v. Stevens 464, 489
Alstead, State v. 490		Ash, Biddle v. 366
Alves v. Henderson 461		Ashley v. Ashley 239
American Co. v. Bradford 249, 269		Ashley v. 239
		v. Pease 312
		v. Wolcott 243

Aspden v. Seddon	45, 222, 228, 294	Baker, Blanchard v.	301
Atherton, State v.	182	v. Brereman	183
Tracy v.	136, 165, 173, 269, 465	v. Crosby	452, 487
Atkins v. Bordman	329, 333, 346	v. Frick	331
v. Chilson	207	v. Johnston	182
Atlanta Mills v. Mason	459	v. McGuire	307
Atlantic De Laine Co., Richmond Man. Co. v.	368	v. St. Paul	182
Atty. Gen. v. Council of Birmingham	437	v. Wheeler	474
v. Corp. of Plymouth	278	Baldwin v. Calkins	250, 303
v. Earl of Lonsdale	61, 432	v. City of Buffalo	461
v. Gee	435, 437	Den v.	472
v. Leeds Corp.	437	Ball v. Nye	47
v. Mayor, &c. of Plymouth	109	Ballacorkish Mining Co. v. Dumbell	64, 253
v. N. J. R. R.	368	Ballacorkish Silver, Lead, and Copper Mining Co. v. Harrison	54
v. Nichol	383, 387, 397	Ballard v. Ballard Vale Co.	488
v. Sheffield Gas Consumers' Co.	435	v. Butler	449
Atwater v. Bodfish	316, 488	v. Dyson	77, 279, 317
Auburn & Syracuse R. R., Miller v.	474	Sargent v.	132, 136, 174
Auction Mart Co., Dent v.	386, 397	Ballard Vale Co., Ballard v.	488
Augsbury, Hall v.	302	Bamford v. Turnley	31, 375
Aurora v. Gillett	2 2	Bancroft, Rogers v.	311
Austin v. Cox	94, 277	Bankart v. Houghton	91, 382
Austria v. Day	365	v. Tennant	91, 471
Aylor, Nichols v.	173	Bankhead v. Brown	272
Aynesley v. Glover	144, 213, 366, 388, 395, 404	Bannister, Fielder v.	350
Ayrault, Curtiss v.	244	Bannon v. Angier v.	277, 351, 464, 489
B.		Barber, Cooper v.	161, 250
Bachelor, New Ipswich Wool-len Factory v.	48, 123	v. Whitely	79
v. Wakefield	134	Barclay v. Howell	130
Back v. Stacey	397	Bardwell v. Ames	58
Backhouse v. Bonomi	35	Barker v. Clark	99, 100
Bonomi v.	355, 416, 417, 420	v. Richardson	163
Badger v. Boardman	82, 367	Barlow v. Chicago, &c. R. R.	464
Doane v.	285, 346	Hole v.	30, 374, 375
Bagg, Powell v.	173	v. Rhodes	8, 98, 100, 103, 476
Bailey v. Appleyard	7, 142	Barnes v. Lloyd	99, 464, 465, 489
v. Jamieson	491	v. Loach	131, 290, 385
Keppell v.	15, 21, 323	Pollard v.	174, 177
v. Stephens	112	v. Sabron	243
v. Stevens	7, 15	Smith v.	490
Baiss, Hackett v.	401	Barrett, Cummings v.	298, 366
Bakeman v. Talbot	331, 346	v. Salis. Man. Co.	66
		Barrow v. Richard	367
		Barrows, Wheeldon v.	199
		Bartlett, Griffin v.	307
		Barwell, Ennor v.	54
		Bass v. Edwards	345, 350
		White v.	192, 198, 199
		Bassett v. Salisbury Man. Co.	248

Bastable <i>v.</i> Syracuse	242	Bickett <i>v.</i> Morris	57, 61, 358, 424,
Bastard, Polden <i>v.</i>	118, 131		430
Bates, Proud <i>v.</i>	222	Biddle <i>v.</i> Ash	366
<i>v.</i> Smith	241	Big Mountain Improvement Co.'s	
Battishill <i>v.</i> Reed	173, 176, 359	Appeal	2
Battle, Biglow <i>v.</i>	304, 311	Bigelow, Richardson <i>v.</i>	312, 359,
Baugh, Wheatley <i>v.</i>	65, 207, 253		444, 445
Baxendale <i>v.</i> McMurray	309, 456	Biglow <i>v.</i> Battle	304, 311
Baxter <i>v.</i> Bower	370, 384, 887	Binckes <i>v.</i> Pash	390
<i>v.</i> Taylor	160, 360	Bingham, Metcalf <i>v.</i>	273
Beach, First Parish in Glou-		Bioren, Watson <i>v.</i>	339
cester <i>v.</i>	134	Bird, Webb <i>v.</i>	135, 138, 141, 162,
Beadel <i>v.</i> Perry	397, 401		187, 369
Bealey <i>v.</i> Shaw	24, 56, 57, 249, 275,	Birkenhead R. R., Laird <i>v.</i>	471
	279, 302	Birmingham Canal Co., Staf-	
Beaman, Kaler <i>v.</i>	311	fordshire & Worcestershire	
Bean <i>v.</i> Coleman	331, 366	Canal Co. <i>v.</i>	159
Renshaw <i>v.</i>	310, 388	Bishop <i>v.</i> North	128, 351
Beard, Fisher <i>v.</i>	182	Parks <i>v.</i>	316
<i>v.</i> Murphy	242	Seeley <i>v.</i>	122, 269
Beardmore <i>v.</i> Tredwell	371, 375	<i>v.</i> Springett	160
Beasley <i>v.</i> Clarke	170	Bissell <i>v.</i> Grant	11, 277
Beatty <i>v.</i> Gregory	474	<i>v.</i> N. Y. Cen. R. R.	182
Beaudley <i>v.</i> Brook	98	Black, Murchie <i>v.</i>	44, 228, 413,
Becker <i>v.</i> St. Charles	182		414
Bedingfield <i>v.</i> Onslow	359	Blackett <i>v.</i> Bradley	161, 185, 224
Beers, Shipman <i>v.</i>	197	Blaine <i>v.</i> Chambers	121
Beeston <i>v.</i> Weate	243, 249	Blaisdell <i>v.</i> Ports., Gt. Falls &	
Belknap <i>v.</i> Trimble	249	Conway R. R.	474
Bell <i>v.</i> Midland R. R.	359, 360,	Blake <i>v.</i> Everett	134
	444	<i>v.</i> Rich	130
Rawson <i>v.</i>	471	Warren <i>v.</i>	126, 457
<i>v.</i> Reed	35	Blakemore, Glamorganshire	
<i>v.</i> Twentyman	427	Canal Navigation Co. <i>v.</i>	129
Bellows <i>v.</i> Sackett	242, 251	Blaker, Arnold <i>v.</i>	181, 314, 341
Bemis <i>v.</i> Upham	368	Blanchard <i>v.</i> Baker	301
Benedict, Strong <i>v.</i>	312	<i>v.</i> Bridges	190, 385, 481, 482
Benjamin <i>v.</i> Storr	381	Bland <i>v.</i> Lipscombe	7
Bennett, Gt. Western R. R. <i>v.</i>	226	Blatchford <i>v.</i> Mayor of Plym-	
Parker <i>v.</i>	126	outh	25, 275
Taylor <i>v.</i>	432	Blewett <i>v.</i> Tregonning	7, 113, 184
Bennison <i>v.</i> Cartwright	180	Blincoe, Gates <i>v.</i>	429
Benson, Dubuque <i>v.</i>	182	Bliss <i>v.</i> Greeley	65
Benton, Harwood <i>v.</i>	65	<i>v.</i> Hall	29, 141, 189, 373
Bentz <i>v.</i> Armstrong	241	<i>v.</i> Kennedy	366
Bermondsey <i>v.</i> Brown	182, 183	Blodgett <i>v.</i> Royalton	183
Berridge <i>v.</i> Ward	320	Bloch <i>v.</i> Pfaff	251
Berry, Brown <i>v.</i>	269	Blundell, Acton <i>v.</i>	62, 64, 248, 253
Bertram, Thomas <i>v.</i>	269	Boardman, Badger <i>v.</i>	82, 367
Best, Brown <i>v.</i>	56, 302	Boddington, Gillon <i>v.</i>	356, 420
Bethune, Gayetty <i>v.</i>	101, 136, 173,	Bodfish, Atwater <i>v.</i>	316, 488
	270	Bognor Commissioners. Rex <i>v.</i>	59
Beutel, Scott <i>v.</i>	11	Boiling Spring Co., Holsman <i>v.</i>	239,
Bibby <i>v.</i> Carter	415		367, 436

Boisblanc, Durel v.	194, 208	Bradley, Norway Plains Co. v.	425,
Bolivar Man. Co. v. Neponset			429, 432
Man. Co.	115, 136, 249, 304	White v.	195, 271
Bond v. Fay	314	Bradley Fish Co. v. Dudley	134, 459
Gray v.	114, 166	Bragg, Androscoggin v.	472
Bonomi, Backhouse v.	35	Crooker v.	301, 425
v. Backhouse	355, 416, 417,	Brainard v. Boston & N. Y.	
	420	Central R. R.	265
Booth v. Alcock	191	v. Clapp	130
Lanier v.	122	Brakeley v. Sharp	127, 269
Sutcliffe v.	48	Branch v. Doane	425, 423
Borden v. Vincent	136, 250	Brandling, Newmarsh v.	470
Bordman, Atkins v.	329, 333, 346	Brayton v. Fall River	438
Phillips v.	229	Brereman, Baker v.	183
Borman, Robbins v.	6, 130	Brewer v. Marshall	82, 367
Borst v. Empie	15, 99, 311	Moffett v.	429
Boston, Dwight Printing Co. v.	67,	Brewster Min. Co., Marvin v.	34,
	254		222, 294
Harback v.	79, 131	Brice v. Randall	185
Hemphill v.	181	Bridges, Blanchard v.	190, 385, 481,
Paine v.	207		482
Valentine v.	181	v. Purcell	473
Boston, &c. R. R. Clark v.	273	Bridgman, Sturges v.	135, 141
Boston & Maine R. R., Dol-		Brigham, v. Smith	122, 269, 270
liff v.	126	Bright v. Walker	11, 114, 151,
Parker v.	253		154, 168, 169, 170, 173, 175, 176,
Boston & N. Y. Cen. R. R.,			458
Brainard v.	265	Bristol, Miller v.	346
Boston & Worcester R. R., Bos-		Bristol Dock Co., Rex v.	433
ton Water Power Co. v.	131	Broadbent v. Ramsbotham	55, 241
Boston Water Power Co. v.		v. Wilkes	185
Boston & Worcester R. R.	131	Brobst, Wetherell v.	90
Boston Water Power Co., Tay-		Brocklehurst, Wardle v.	104
lor v.	131, 181	Brockwell, Winter v.	471
Bowen v. Connor	99, 269	Brogden, Humphries v.	34, 35, 42,
v. Team	2		230, 293, 409
Bower, Baxter v.	370, 384, 387	Bronson v. Coffin	79, 323
v. Hill	338, 357, 454, 461,	Brook, Beaudley v.	98
	462, 476	Brooks v. Curtis	228
Riviere v.	83, 408	Swazy v.	100
Bowers v. Suffolk Man. Co.	182	Brossart v. Corlett	314, 339
Bowker, Putnam v.	134	Brouwer v. Jones	367
Bowlsby v. Spear	241	Brown, Bankhead v.	272
Bowman v. New Orleans	242	Bermondsey v.	182, 183
Bowser, Whetstone v.	248	v. Berry	269
Boyd, Cannon v.	124	v. Best	56, 302
Boylston Market Asso.,		v. Cayuga & Susq. R. R.	429
Schworer v.	367	v. Chadbourne	429
Brace v. Yale	249	Frazier v.	65, 241, 248
Bracewell, Nuttall v.	48, 53, 310	v. Illius	254, 439
Brackney, Thomas v.	309	Mahan v.	32, 33, 190, 203,
Bradford, American Co. v.	249, 269		205
Bradley, Blackett v.	161, 185, 224	Miller v.	229, 471, 472
Buddington v.	249	v. Robins	38, 409, 410, 485

Brown, Suffield v.	118, 267	Butler, Ballard v.	449
Tickle v.	170	v. Peck	242
Vestry of Bermondsey v.	263	Butman v. Hussey	425
v. Windsor	236	Butt v. Imperial Gas Co.	81, 82
Browne v. Trustees of M. E. Church	460	Butterworth v. Crawford	127
Browning, Foster v.	4, 472	Byrnes v. Cohoes	242
Brownlow v. Tomlinson	76		
Browse, Fisher v.	182	C.	
Bruckhardt, Haldeman v.	65, 248	Calderwood, San Francisco v.	182
Brumfitt v. Roberts	8	Caldwell v. Fulton	5, 222
Thorpe v.	15, 73, 356, 445	Mosier v.	65
Brummell v. Wharin	408	Caledonia R. R. v. Sprot	94
Brumraell v. Wharin	83	Calkins, Baldwin v.	250, 303
Brunton v. Hall	314	Callaway v. Nolley	461
Bryant v. Lefever	188	Campbell v. Mesier	295
Buccleuch, Duke of, Wakefield v.	36, 185	v. Race	343
Buchanan, Anderson v.	271	v. Smith	250
Buckby v. Coles	452, 457, 460	v. Wilson	113, 160, 169
Bucknall, Heath v.	363, 394, 457	Canaan, Green v.	182
Buddington v. Bradley	249	Canada So. R. R., Nichol v.	241
Buell v. Read	302	Canham v. Fisk	283
Buffalo, &c. R. R., Conhocton R. R. v.	241	Cannon v. Boyd	124
Buffalo Hydraulic Asso., Evangelical Home v.	351	Canny v. Andrews	451
Buffum v. Harris	66, 241	Capel, Buszard v.	5
Bullard v. Harrison	268, 342, 343	Capers v. McKee	346
Bullen v. Runnels	311	v. Wilson	351
Bulwinkle, Napier v.	207	Carbines, Hawkins v.	332, 345, 449
Bunn, Portmore v.	93	Carbrey v. Willis	78, 124, 166, 251, 270
Bunnell, Warren v.	273	Carleton, Alley v.	270, 452
Burbank, Goodrich v.	10	v. Redington	429, 474
Burchard, Voorhees v.	99, 121	Carlisle v. Cooper	307, 366, 436, 464
Burchell, Dodd v.	116, 268	Carlyon v. Lovering	20, 142, 158, 185
Burden, Stein v.	56, 297, 302, 366	Carney, Underwood v.	99, 339
Burger, Wynkoop v.	276, 346	Carpenter, Claffin v.	470
Burke, Couch v.	472	v. Gwynn	182
Burn, Straight v.	387, 394	Lowe v.	112, 148
Burnet, Colvin v.	250	Viall v.	270, 452, 487
Henning v.	275, 321, 454	Carr v. Foster	149, 178, 179
Burnham, Choate v.	314	Carrick v. Johnston	343
v. Kempton	302, 307, 366	Carrig v. Dee	207
v. McQuestein	134	Carter, Bibby v.	415
Burr v. Mills	99, 124	v. Harlan	473
Sherwood v.	250	Pyer v.	115, 195, 199
Burroughs, Wheeldon v.	127	Seymour v.	473
Burrows, Underwood v.	78, 110	Tinicum Fishing Co. v.	11
Wheeldon v.	121	Cartwright, Bennison v.	180
Bury v. Pope	205	Cary v. Daniels	239
Buszard v. Capel	5	Case, Prince v.	473
		Casey, Heald v.	65

Casey v. Ledbetter	374, 375	Cincinnati v. White	181
Cashford, Dawney v.	145	City of Buffalo, Baldwin v.	461
Cave v. Crafts	123	City of London Brewery Co. v.	
Cavey v. Lidbetter	30, 374, 375	Tennant	288, 366, 370, 387, 401
Cawkwell v. Russell	282, 310, 362	City of Quincy v. Jones	411
Cawthorne, Whitaker v.	473	Clack, White v.	271
Cayuga & Susq. R. R., Brown v.	429	Claffin v. Carpenter	470
Cen. R. R., Hetfield v.	472	Clapp, Brainard v.	130
Central Wharf v. India Wharf	450	Clark, Barker v.	99, 100
Chadbourne, Brown v.	429	v. Boston, &c. R. R.	273
Chadwick, Coleman v.	34, 222	Clarke v.	387
v. Trower	44	v. Cogge	26, 267
Chalfant, Wilson v.	472	Denniston v.	10
Chamberlain, Nicholas v.	110	Donnell v.	134
Chambers, Blaine v.	121	Martin v.	367
Chance, Hammer v.	151	v. Parker	94
Chandler v. Howland	301	v. Way	89
v. Jamaica Pond Aqueduct	277, 351, 465	Clarke, Beasley v.	170
Jamaica Pond Aqueduct		v. Clark	387
Co. v.	4, 461, 464	v. French	443
Parley v.	73, 130	Roberts v.	174
v. Thompson	33, 84, 203, 481	Clawson v. Primrose	208, 407
Chapin v. Sullivan R. R.	130	Clay v. Thackrah	172, 174
White v.	135, 429	Clayton v. Corby	153, 180
Chappell, Child v.	182, 183	Clear Lake Co., Grigsby v.	307
Charless v. Rankin	45, 411	Clement v. Durgin	472
Charlestown, Tufts v.	95, 266	Cleveland v. Ware	166
Chase, Grant v.	101, 193, 487	Clifford v. Hoare	5, 332
v. Silverstone	65, 253	Clinton v. Myers	65
Chasemore v. Richards	54, 62, 64, 65, 68, 135, 242, 248, 253	Cloud, Pierce v.	135
Chatfield v. Wilson	65, 248, 253	Clowes v. Staffordshire Potteries Waterworks Co.	364, 436
Chauntler v. Robinson	17	Clue, Darling v.	149, 462
Checkley, Midland R. R. v.	422	Cobb v. Davenport	7
Cheever v. Pearson	473	Cochecho R. R., Kimball v.	269
Chelsea, Greene v.	182	Cochecho Man. Co., Whittier v.	303
Cherry v. Stein	207	Cochrane, Ewart v.	116, 271
Chestnut Hill, &c. Co. v. Piper	134	Cocker v. Cowper	3, 89, 90, 252
Chicago, &c. R. R., Barlow v.	464	Codling v. Johnson	337
Chicago, &c. R. R. Co., Cook Co. v.	5	Codman v. Evans	6, 130, 186
Chicago, No. Trans. Co. v.	34	Coe v. Winnipiseogee Lake Co.	366
v. Northwestern R. R.	173	Coffin, Bronson v.	79, 323
Rees v.	182	Cogge, Clark v.	26, 267
Chichester v. Lethridge	75, 317	Cohen, Wilson v.	242
Child v. Chappell	182, 183	Cohoes, Byrnes v.	366
Chilson, Atkins v.	207	Colburn v. Richards	301, 429
Choate v. Burnham	314	Colchester v. Roberts	324, 328
Chorley, Regina v.	25, 75, 76, 177, 461, 465, 485	Cole v. Drew	130
Chorlten, Hinde v.	79	Cole Silver Mining Co. v. Virginia & Gold Hill Water Co.	248
Christian, Senhouse v.	326, 351	Colebeck v. Girdlers' Co.	285, 295, 346
Church, Womersley v.	439	Coleman, Bean v.	331, 366
		v. Chadwick	34, 222

Coleman, Glover v.	144, 148, 180	Corporation of Plymouth, Atty. Gen. v.	278
Coles, Buckby v.	452, 457, 460	Corporation of Yarmouth v. Simmons	450
v. Sins	81	Correth, Tolle v.	297, 301
Collier v. Pierce	122, 200	Cottel v. Luttrell	304
Colimas, Pico v.	285	Cotterell v. Griffiths	291
Collins v. Prentice	122, 269, 271	Cotton v. Pocasset Man. Co.	302, 325
Colvin v. Burnet	250	Couch v. Burke	472
Commissioners v. Taylor	461	Coulson, Newcomen v.	315, 455
Commissioners of Lincoln, Hall v.	273	Council of Birmingham, Atty. Gen. v.	437
Commissioners of New Forest, Mill v.	159, 163	County Commissioners, Denham v.	130, 273, 488
Commonwealth v. Low	181	Courtauld v. Legh	210
Scheuley v.	359	Cousens v. Rose	314
v. Upton	29, 373, 381	Coutts v. Gorham	94, 191, 384
v. Vincent	299	Coventry, Swanborough v. Van Hoesen v.	301
Compton v. Richards	192	Covington v. Freking	182
Comstock v. Johnson	121	Cowell v. Thayer	250, 303, 306, 307
v. Van Deusen	314	Cowles v. Gray	182
Conhocton R. R. v. Buffalo, &c. R. R.	241	Cowling v. Higginson	279, 316
Connecticut & Passumpsic R. R. v. Holton	130	Cowper, Cocker v.	3, 89, 90, 252
Connehan v. Ford	181	Cox, Austin v.	94, 277
Conner, Hart v.	351	George v.	99, 351
Connor, Bowen v.	99, 269	v. Matthews	94, 191, 384
Ogburn v.	242	Coyney, Stafford v.	181, 183
Constable v. Nicholson	7, 164	Crafts, Cave v.	123
Converse, Plimpton v.	124, 457	Craig v. Craig	361
Plympton v.	134	Craig, Craig v.	361
Conway, Peck v.	82, 99, 367	Crain v. Fox	468, 490
Cook Co. v. Chicago, &c. R. R. Co.	5	Crawford, Butterworth v. White v.	15, 464
Cook v. Hull	301	Crawshaw v. Sumner	228
v. Mayor of Bath	462, 463	Creighton, Crysler v. Greene v.	367
v. Stearns	473	Crewson v. Grand Trunk R. R.	241
Cooke v. Forbes	372, 380	Crippen v. Morss	93
Gerrard v.	285, 346	Cromwell v. Selden	311
Coolidge v. Hagar	100, 123	Cronin, McMillan v.	281, 285, 346
v. Learned	136	Crooker v. Bragg	301, 425
Cooper v. Barber	161, 250	Crosby, Baker v.	452, 487
Carlisle v.	307, 366, 436, 464	Hill v.	136, 174
v. Hubbuck	148, 290	Crosland, Lamb v.	163, 165
Copeland, Morse v.	4, 90, 472	Cross v. Lewis	114, 203, 206
Copetake, Hutchinson v.	389	Rex v.	373
Corbett, Curriers' Co. v.	192, 198, 366, 394, 484	Crossley v. Lightowler	71, 119, 308, 358, 372, 424, 435, 439, 462
Corby, Clayton v.	153, 180	Crounse v. Wemple	134
Corlett, Brossart v.	314, 339	Crow, Jones v.	239, 249
Corliss Steam Engine Co., Prov. Tool Co. v.	127	Crowland, Darby v.	241
Corning v. Gould	450, 465	Crowther, Elwell v.	424
Cornish, Dakin v.	302		
Cornman, Arnold v.	450		

Crump v. Lambert	141, 189, 371, 380	Dawes v. Hawkins	345
Crysler v. Creighton	89	Dawney v. Cashford	145
Culverwell v. Lockington	122	Dawson, Duke of Bedford v.	355
Cummings v. Barrett	298, 366	Plumleigh v.	425
Cunningham, Tudor Ice Co. v.	335	v. St. Paul Ins. Co.	339, 368
Currie v. Gale	165	Day, Austria v.	365
Curriers' Co. v. Corbett	192, 198, 366, 394, 484	Spooners v.	157
Curtice v. Thompson	307, 428	De Hart, Earl v.	368
Curtis v. Keesler	164	De Witt v. Harvey	93, 312
Curtiss v. Ayrault	244	v. Ithaca	181
Brooks v.	228	Dean, Fuhr v.	3, 89
Hurd v.	311	Jarvis v.	182
v. Noonan	472	Debenham, Theed v.	401
Stetson v.	337	Decorah Woolen Mill Co. v.	
v. Hoyt	183	Greer	283
Cuthbert v. Lawton	465	Dee, Carrig v.	207
Cutting, Hill v.	474	Deig, Wild v.	272
Cutts, Sweet v.	66, 241, 242	Del Vecchio, Eno v.	228
D.		Delaware & Hudson Canal Co.,	
Dakin v. Cornish	302	Selden v.	474
Dalton, Angus v.	135, 140, 161, 221, 229, 233, 235	Delamirie, Armory v.	443
Dana, Evans v.	127	Delorme, Haag v.	177
v. Valentine	30, 366, 371, 382	Den v. Baldwin	472
v. Wentworth	367	v. Jersey City	181
Dand v. Kingscote	26, 110, 267, 351	Denham v. County Commis-	
Daniel v. Anderson	13	sioners	130, 273, 488
v. North	113, 163, 165	Dennett v. Stevens v.	3, 169
Daniels, Cary v.	239	Dennis v. Sipperly	443
Darby v. Crowland	241	v. Wilson	99
Smith v.	45, 222, 223, 294	Denniston v. Clark	10
Dare v. Heathcote	317	Dent v. Auction Mart Co.	386, 397
Dark v. Johnston	11, 89	Denton v. Leddell	122, 457
Darling v. Clue	149, 462	Depui, Dyer v.	429
Darlington v. Painter	302	Des Moines v. Hall	182
Darwin v. Upton	205	Deshon v. Porter	312
Davenport, Cobb v.	7	Desloge v. Pearce	472
v. Lamson	325	Devereux, Pope v.	490
Davey, Roberts v.	109	Dewey v. Williams	311
Davidson v. Nicholson	113, 165	Dewhurst v. Wrigley	115
Wakeley v.	311	Dexter v. Prov. Aqueduct Co.	253
Davies v. Marshall	91, 384	Dickenson v. Grand Junction	
v. Sear	269	Canal Co.	242, 248
v. Williams	177, 179	Dickey v. Tennison	272
Davis, Glenn v.	460	Dickinson v. Worcester	242
Lattimore v.	242	Dilling v. Murray	56
McLean v.	462	Dillman v. Hoffman	124
v. Morgan	96, 467	Dimmet v. Eskridge	429
		Dixon, Wimbledon & Putney	
		Commons Conservators v.	316, 317, 319, 347, 455
		Doane v. Badger	285, 346
		Branch v.	425, 428
		Dodd v. Burchell	116, 268
		v. Holme	43

Doe d. Hanley v. Wood	5, 470	Durham, Porter v.	242
Dodge v. McClintock	472	Durham & Sunderland R. R. v. Walker	109
Dolliff v. Boston & Maine R. R.	126	Dutcher v. Hayden	208, 408
Donahoe, Kelly v.	131	Dwight Printing Co. v. Boston	67, 254
Donald, National Guaranteed Manure Co. v.	159, 163, 164, 451	Dwinel, Veazie v.	239, 429
Donnell v. Clark	134	Dyce v. Lady James Hay	5, 280
Dorney, Mertz v.	307	Dyer v. Depui	429
Dougal v. Wilson	205	v. Sandford	4, 472, 489
Doughty, Gray's Inn Soc. v.	80	Russ v.	126
Dovaston v. Payne	8	Dyers' Co. v. King	387
Dow, Perkins v.	301	Dyson, Ballard v.	77, 279, 317
Stetson v.	96, 266, 336		
Dowling v. Hennings	228		
Dowson, Maberley v.	167		
Doyle v. Lord	121, 197, 205, 407		
Drake v. Wells	474, 475		
Drew, Cole v.	130		
Drewell v. Towler	78		
Drewett v. Sheard	53, 463, 465		
Driscoll, Gilmore v.	38, 45, 232, 292, 411, 485		
Roath v.	65, 253		
Dubuque v. Benson	182		
v. Maloney	182		
Dubuque, &c. R. R., Noll v.	464		
Dudden v. Guardians of Clutton Union	54		
Dudley, Bradley Fish Co. v.	134, 459		
v. Horton	352		
Dudley Canal Co. v. Graze- brook	226, 422		
Dugdale v. Robertson	223		
Duinneen v. Rich	88, 472		
Duke of Bedford v. Dawson	355		
Duke of Buccleuch, Wake- field v.	36, 185, 224, 294		
Duke of Devonshire v. Eglin	471		
Duke of Newcastle, Jackson v.	397, 402		
Duke of Somerset v. Fogwell	89, 96, 284		
Dumbell, Ballacorkish Mining Co. v.	64, 253		
Duncan, Ellis v.	65, 253		
v. Louch	17, 75, 76		
Duncomb's case	343		
Dunham, Parkins v.	464		
Dunklee v. Wilton R. R.	123		
Dunnell, Ingraham v.	366		
Durel v. Boisblanc	194, 208		
v. Pritchard	366		
Durgin, Clement v.	472		
		E.	
		Eadon v. Jeffcock	45, 223, 294
		Eames, Hittinger v.	299
		Earl v. De Hart	368
		Earl of Dudley, Stourbridge Canal Co. v.	226, 422
		Earl of Granville, Hilton v.	185, 224
		Earl of Lonsdale, Atty. Gen. v.	61, 432
		Earl of Romney, Medway Nav- igation Co. v.	296
		Earl of Sandwich v. Great Northern R. R. Co.	297
		East India House Estates Co., Isenberg v.	366
		East River Bank, Tallmadge v.	182, 367
		Easter v. Little Miami R. R.	79
		Eastman v. Amoskeag Man. Co.	428
		Eaton v. Swansea Waterworks Co.	173
		Eckersley, Tipping v.	365
		Eden, South Metropolitan Cem- etery Co. v.	321, 454
		Edes, Wood v.	473
		Edgerton v. Huff	299
		Edgington, Morris v.	28, 97, 98, 101, 268, 278
		Edson v. Munsell	163
		Edwards, Bass v.	345, 350
		Reignolds v.	178, 468
		Eggleston v. N. Y. &c. R. R.	472
		Eglin, Duke of Devonshire v.	471
		Elliot v. Fitchburg R. R.	301, 426, 443
		v. North Eastern R. R.	226
		Elliotson v. Feetham	141
		Elliott, North Eastern R. R. v.	39

Ellis v. Duncan	65, 253	Ferris, Union Mills v.	301
v. Manchester Carriage Co.	192, 198	Fetters v. Humphreys	122, 127, 270, 457
v. Mayor & Corporation of Bridgnorth	15	Fickas, Taylor v.	241
Sibley v.	136	Field, Hodgson v.	110, 275
Elmhirst v. Spencer	366, 426	Owen v.	10, 367, 368, 464, 465, 489
Elwell v. Crowther	424	Fielder v. Bannister	350
Embrey v. Owen	53, 56, 69, 275, 296, 300, 358, 426	Fifty Associates v. Tudor	207
Emerson, Adams v.	6, 73, 130	Finch v. Gt. Western R. R.	315, 455
v. Wiley	465	Fineux v. Hovenden	433
Empie, Borst v.	15, 99, 311	Finlinson v. Porter	109, 110, 276
Ennor v. Barwell	54	First Baptist Society v. Grant	79
Hodgkinson v.	68, 254, 258, 439	First Parish in Gloucester v. Beach	134
Eno v. Del Vecchio	228	First Parish in Medford v. Pratt	134
Esher, Maynard v.	198	Fisher v. Beard	182
Eskridge, Dimmet v.	429	v. Browse	182
Esling v. Williams	166	Pastorius v.	425
Espley v. Wilkes	95, 265, 269	Fishmongers' Co., Lyon v.	446
Essex Co., McFarlin v.	7	Fisk, Canham v.	283
Estes v. Troy	181	Franklin v.	241
Eulrich v. Richter	243	Fiske, Allen v.	474
Evangelical Home v. Buffalo Hydraulic Asso.	351	v. Wilbur	311
Evans, Codman v.	6, 130, 186	Fitchburg R. R., Elliot v.	301, 426, 443
v. Dana	127	Fitzhugh v. Raymond	276
Hall v.	216, 385	Flagg v. Flagg	130, 273, 488
v. Merriweather	301	Flagg v.	130, 273, 488
Evansville, Pettigrew v.	242	Flannigain, White v.	96, 266
Everett, Blake v.	134	Fletcher, Gt. Western R. R. v.	226
Ewart v. Cochrane	116, 271	Palmer v.	94, 191, 192, 384
		Ray v.	306
		Wallace v.	136, 165
		Flight v. Thomas	29, 141, 143, 178, 189, 215
F.		Fogwell, Duke of Somerset v.	89, 96, 284
Fairbanks, Winthrop v.	99	Foley, Handy v.	99
Fairhaven, Lawrence v.	250	Simper v.	215, 397, 459, 476
Fall River, Brayton v.	438	v. Wyeth	34, 38, 413, 485
Farnsworth v. Taylor	266, 336	Foot v. N. H. & Northampton Co.	473
Farnum v. Platt	345	Foote, Parker v.	135, 203, 209
Farr, Perrine v.	273	Forbes, Cooke v.	372, 380
Farrand v. Marshall	34	Ford, Conneham v.	181
Faulkner, Town v.	307	Gurney v.	78, 367, 368
Fay, Bond v.	314	Forsyth, Rhea v.	366
v. Salem & Danvers Aqueduct Co.	299	Foster v. Browning	4, 472
Feetham, Elliotson v.	141	Carr v.	149, 178, 179
Fentiman v. Smith	3, 89, 90	v. Spooner	92
Fenton, Abson v.	110, 352	Fox, Crain v.	468, 490
Ferguson v. Whitsell	477	v. Hart	490
Fernald, Pierre v.	135, 206, 220		
Ferrea v. Knipe	301		

Fox v. Purssell	384	Gehrung, Klein v.	208
v. Union Sugar Refinery	266, 336, 339	Geiger, Prentice v.	239, 258, 309
Foxall v. Venables	164	Gell, Arkwright v.	61, 139, 161, 167, 244, 251
Framingham, Parker v.	266, 359	Gemmel, Myers v.	197, 205
Francis, Greenleaf v.	65, 253	Gentleman v. Soule	182
Laumier v.	242	George v. Cox	99, 351
Franklin v. Fisk	241	Gerber v. Grabel	209
Frazier v. Brown	65, 241, 248	Gerenger v. Summers	303
Frearson, Howton v.	267	Germantown Water Co., Mc-	
Freeman, Wright v.	207, 465, 491	Callum v.	67, 258
Freking, Covington v.	182	Gerrard v. Cooke	285, 346
French, Absor v.	343	Gifford, Jesser v.	359
Clarke v.	443	Reid v.	366, 382
v. Marstin	326	Gilbert, Partridge v.	228, 295
v. Morris	10	v. Peteler	89, 367
Frewen v. Philipps	14, 32, 174, 211, 214	Giles v. Simonds	470, 474
Frick, Baker v.	331	Gilford v. Lake Co.	307
Frost, Wolfe v.	472	Pattisson v.	365
Fry, Richards v.	147	Gill, Hext v.	5, 26, 36, 222
Fuhr v. Dean	3, 89	Gillet, Aurora v.	242
Fuller, Hull v.	276	v. Johnson	301
Tomlin v.	314	Gillham v. Madison R. R.	242
Fulton, Caldwell v.	5, 222	Gillingham, Harris v.	473
Furber, Garland v.	331	Gillis, Ryckman v.	45, 222, 294
		Gillon v. Boddington	356, 420
		Gilmore v. Driscoll	38, 45, 232, 292, 411, 485
		Gilmour, Miner v.	297, 300
		Gilsey, Wheeler v.	269
		Gimson, Worthington v.	104, 117
		Girdlers' Co., Colebeck v.	285, 295, 346
		Gladfelter v. Walker	309
		Glamorganshire Canal Naviga-	
		tion Co. v. Blakemore	129
		Glave v. Harding	117, 265
		Glean, Pierson v.	429
		Gleason v. Gary	429
		Glenister, Skull v.	98, 284, 321, 324
		Glenn v. Davis	460
		Glover, Aynesley v.	144, 213, 366, 388, 395, 404
		v. Coleman,	144, 148, 180
		Goble, Martin v.	281, 290, 405
		Godfrey, Macomber v.	55
		Goldsmid v. Tunbridge Wells	
		Imp. Com.	259, 308, 423, 432, 434
		Goldwin, Tenant v.	47, 198, 258
		Gomme, Allan v.	317, 453
		Goodale, Amoskeag Man. Co. v.	449
		v. Tuttle	65, 241, 248, 429
		Goodrich v. Burbank	10
G.			
Gale, Currie v.	165		
Marston v.	474		
Galland, Pinnington v.	98, 267, 350, 465		
Ganley v. Looney	312		
Gannon v. Hargadon	241		
Gardiner, Onley v.	112, 153, 173, 174, 176		
v. Tisdale	181		
Garfield, Perrin v.	465		
Garland v. Furber	331		
v. Hodsdon	312		
Garrett v. Jackson	135		
Gary, Gleason v.	429		
Gates v. Blincoe	429		
Gateward's case	164		
Gaved v. Martyn	20, 25, 56, 61, 88, 132, 170, 173, 244, 251		
Gaw v. Hughes	266		
Gayetty v. Bethune	101, 136, 173, 270		
Gayford v. Moffatt	12, 14, 26, 267, 320		
Gee, Atty. Gen. v.	435, 437		

Goold v. Great Western Deep Coal Co.	26, 109	Griffiths, Cotterell v.	291
Gorham, Coutts v.	94, 191, 384	Grigsby v. Clear Lake Co.	307
Goring, Holmes v.	28, 267, 268, 319, 449, 452, 486, 488	Griswold, Parker v.	301
Gormley v. Sanford	242	Groton v. Haines	429
Goudy, Standiford v.	122	Grove, Ogden v.	271
Gould, Corning v.	450, 465	Groves, Rose v.	446
Gowen v. Phila. Ex. Co.	134, 182	Guardians of Clutton Union, Dudden v.	54
Grabel, Gerber v.	209	Guest v. Reynolds	190, 209
Grace, Talbott v.	186	Guggenheim, Royce v.	200
Graham, Hyde v.	406, 475	Gurney v. Ford	78, 367, 368
Grand Junction Canal Co., Dickenson v.	242, 248	Guthrie v. New Haven	183
v. Shugar	40, 55, 67	Gwynn, Carpenter v.	182
Grand Trunk R. R., Crewson v.	241	H.	
Grant, Bissell v.	11, 277		
v. Chase	101, 193, 487	Haag v. Delorme	177
First Baptist Soc. v.	79	Hackett v. Baiss	401
McGuire v.	45, 411	Hadden, Woodyer v.	182, 320
Grave, Ladyman v.	12, 149, 174, 216	Hadley, Lide v.	270
Grave, Robinson v.	191	Hagar, Coolidge v.	100, 123
Gray v. Bond	114, 166	Haines, Groton v.	429
Cowles v.	182	Roberts v.	224, 294
Gray's Inn Soc. v. Doughty	80	v. Taylor	365
Grazebrook, Dudley Canal Co. v.	226, 422	Haldeman v. Bruckhardt	65, 248
Great Eastern R. R., United Land Co. v.	129, 276, 281, 314, 315, 338, 453, 455	Hale v. McLeod	263
Great Falls Co. v. Worster	429	v. Oldroyd	462, 468, 489
Great Northern R. R., Earl of Sandwich v.	297	Hall v. Augsburg	302
Swaine v.	381	Bliss v.	29, 141, 189, 373
Great Western Deep Coal Co. Goold v.	26, 109	Brunton v.	314
Great Western R. R. v. Bennett	226	v. Com. of Lincoln	273
Finch v.	315, 455	Des Moines v.	182
v. Fletcher	226	v. Evans	216, 385
Greatrex v. Hayward	167, 244	v. Lund	111
Greeley, Bliss v.	65	v. McLeod	182, 271
Green v. Canaan	182	Moore v.	404
Greene v. Chelsea	182	v. Nottingham	19
v. Creighton	367	v. Swift	178, 456, 457
Greenleaf v. Francis	65, 253	Halliday, Greenslade v.	281, 362
Greenslade v. Halliday	281, 362	Halsey, Knight v.	204
Greer, Decorah Woolen Mill Co. v.	283	Hamboro, Hutton v.	332
Gregorie, Middleton v.	250	Hamer v. Knowles	420
Screven v.	452	Hamilton v. Vestry of St. George	285, 346
Gregory, Beatty v.	474	Hammond, Housee v.	239
Griesemer, Kauffman v.	242	Langley v.	104, 107
Griffin v. Bartlett	307	Tyler v.	457, 488
		v. Zehner	135
		Hampton, Taylor v.	450
		Hancock, Sharpe v.	129
		Thurston v.	34, 38, 411, 485
		v. Wentworth	450
		Handy v. Foley	99

Hankinson, Holford v.	144, 185, 240, 263	Hayden v. Dutcher	208, 408
Hanmer v. Chance	151	Hayes v. Richardson	473
Hanna, Wagner v.	11	v. Waldron	239
Harback v. Boston	79, 131	Hayford v. Spokesfield	468, 489
Harbidge v. Warwick	174, 176, 214, 215, 216	Hays v. Hays	242
Harding, Glave v.	117, 265	Hays v.	242
v. Wilson	95, 265	Hayward, Greatrex v.	167, 244
Harford, Monmouthshire Canal Co. v.	170, 174, 175	Hazard, Hickey v.	299
Russell v.	12	v. Robinson	457
Hargadon, Gannon v.	241	Headon, Martin v.	386
Harkins, O'Neil v.	411	Heald v. Casey	65
Harlan, Carter v.	473	Heath v. Bucknall	363, 394, 457
Harper v. Parish of the Advent	134	v. Ricker	79
Richards v.	225	v. Williams	239, 429
Harrington, Jackson v.	306	Heathcote, Dare v.	317
Harris, Amidon v.	10	Heaton, Knight v.	461
Buffum v.	66, 241	Hecht, Kuhlman v.	96
v. Gillingham	473	Heigate v. Williams	457, 476
v. Ryding	34, 43, 222, 294	Hemphill v. Boston	181
v. Smith	101, 122	Henderson, Alves v.	461
Springfield v.	301	Hennessey v. Old Colony R. R.	265
Harrison, Ballacorkish Silver, Lead, and Copper Mining Co. v.	54	Henning v. Burnet	275, 321, 454
Bullard v.	268, 342, 343	Winfield v.	82, 367
Wallis v.	471, 475	Hennings, Dowling v.	228
Wyatt v.	34, 42, 410, 485	Henn's case	343
Harrop v. Hirst	357, 433	Herrick v. Marshall	99
Hart v. Conner	351	Hershey, Wissler v.	269
Fox v.	490	Hervey v. Smith	78, 361, 471
Osborn v.	271	Herz v. Union Bk. of London	217, 219, 398
v. Vose	250	Hetfield v. Cen. R. R.	472
Hartman, Stewart v.	272	Hew Singers, Stokoe v.	373, 489
Hartshorne v. South Reading	368	Hewett, Wood v.	78
Harvey, De Witt v.	93, 312	Hewitt v. Isham	92
v. Walters	78, 456, 459	Hewlins v. Shippam	1, 3, 89
Harwood v. Benton	65	Hext v. Gill	5, 26, 36, 222
Haskell v. New Bedford	438	Heydon, Staples v.	145
Haskins v. Haskins	301	Hickey v. Hazard	299
Haskins v.	301	Hickman's case	273
Hastings, Smyles v.	96, 266, 269, 270, 350, 464	Hide v. Thornborough	42, 140, 229
Hathaway, Jackson v.	130	Hieatt v. Morris	208, 228
Hauck, Stein v.	208, 220	Higginson, Cowling v.	279, 316
Havens v. Klein	122	Hildreth v. Lowell	6, 130
Haverstick v. Sipe	207	Hill, Bower v.	338, 357, 452, 461, 462, 476
Hawker, Wickham v.	7	v. Crosby	136, 174
Hawkins v. Carbines	332, 345, 382, 449	v. Cutting	474
Dawes v.	345	v. Hill	474
v. Wallis	78	Hill v.	474
		v. Lord	7, 69
		Mason v.	56, 249, 252, 358, 424, 462
		v. Sayles	367
		v. Tupper	9, 15, 21, 22

Hilton v. Earl Granville	185, 224	Horton, Dudley v.	352
Perley v.	250	Houghton, Bankart v.	91, 382
Hinde v. Chorlton	79	Houpes v. Alderson	331
Hirst, Harrop v.	357, 433	Housee v. Hammond	239
Hittinger v. Eames	299	Houston v. Laffee	472, 473
Hoare, Clifford v.	5, 332	Hovenden, Fineux v.	433
v. Metro. Board of Works	78	Hovey v. Mayo	10
Hobbs v. Lowell	181, 182	Howard v. Rogers	266
Nudd v.	181	Wright v.	24, 57, 249, 252, 275, 296, 355, 357, 424
Hoboken, Trustees v.	181	Howe v. Alger	96, 265, 266
Hoddinott, Sampson v.	24, 51, 157, 252, 275, 300, 358, 424	Howe Scale Co. v. Terry	429
Hodges v. Hodges	428	Howell, Barclay v.	130
Hodges v.	428	v. King	324, 326
v. Raymond	239, 429	Howland, Chandler v.	301
Hodgkinson v. Ennor	68, 254, 258, 439	Howton v. Frearson	267
Hodgson v. Field	110, 275	Hoy v. Sterrett	207
Proctor v.	28, 268, 269, 486	Hoyt, Curtiss v.	183
Hodkinson, Popplewell v.	39, 94, 227	v. Hudson	241
Hodsdon, Garland v.	312	Hubbard v. Town	208
Hoffman, Dillman v.	124	Hubbell v. Warren	82, 367
Holback v. Warner	145	Hubbuck, Cooper v.	148, 290
Holbrook, Arnold v.	341, 343	Hudson v. Tabor	59
Lasala v.	34, 38, 411	Hoyt v.	241
Holdane v. Trustees	183	Hudson River R. R., Ludlow v.	294
Holden v. Tilley	160	Hudspeth, Winship v.	160, 163, 168
Hole v. Barlow	30, 374, 375	Huff, Edgerton v.	299
Holford v. Hankinson	144, 185, 240, 263	v. McCauley	7, 69, 88
Holker v. Poritt	49, 55	Hughes, Gaw v.	266
Holland, Pantou v.	411	Hugo, Keats v.	79, 196, 207
Holliday, Sloan v.	316	Hull, Cook v.	301
Hollis v. Proud	324	v. Fuller	276
Holme, Dodd v.	43	Hulme v. Shreve	425
Holmes v. Goring	28, 267, 268, 319, 449, 452, 486, 488	Humphreys, Fettes v.	122, 127, 270, 457
v. Seeley	185, 269, 343, 346, 350, 452	Humphries v. Brogden	34, 35, 42, 230, 293, 409
Holms v. Seller	96, 108	Hungerford, Munson v.	182
Holsman v. Boiling Spring Co.	239, 367, 436	Hunt, Kirkendall v.	367
Holt, Mason v.	473	v. Peake	34
Holton, Conn. & Passumpsic R. R. v.	130	Hurd v. Curtis	311
Hook, Oliver v.	11, 101, 122	Hurlbut v. Leonard	250
Hooker, Stiles v.	250, 307	Hurley, Morrill v.	241
v. Utica & Minden Turnpike Co.	131	Northam v.	108, 275, 426
Hopwood v. Schofield	359	Huskinson, Poole v.	181
Horn, Legg v.	136	Huson v. Young	331
Horne v. Taylor	449	Hussey, Butman v.	425
Horner v. Stillwell	307	Hutchinson v. Copestake	389
v. Watson	34, 222	Ingraham v.	204, 249
		Shadwell v.	359, 360
		Huttemeier v. Albro	99
		Hutto v. Tindall	490
		Hutton v. Hamboro	332
		Hyde v. Graham	406, 475

Hyde, <i>v. Jamaica</i>	183	Jaqui <i>v. Johnson</i>	351
Hynds <i>v. Shults</i>	307	Jarvis <i>v. Dean</i>	182
		Jasper, <i>Laney v.</i>	242
I.		Jay, <i>Salters' Co. v.</i>	211
Illius, <i>Brown v.</i>	254, 439	Jeffcock, <i>Eadon v.</i>	45, 223, 294
Imhoff, <i>Kieffer v.</i>	123, 457	Jefferson, <i>Arnold v.</i>	397, 406
Imperial Gas Co., <i>Butt v.</i>	81, 82	Jeffries <i>v. Jeffries</i>	367
In re Mercer Street	96, 265	Jeffries <i>v.</i>	367
India Wharf, <i>Central Wharf v.</i>	450	<i>v. Williams</i>	415
Inge, <i>Liggins v.</i>	90, 471	Jenkins, <i>Janes v.</i>	194, 207, 292, 407
Ingraham <i>v. Dunnell</i>	366	Jenks <i>v. Williams</i>	81
<i>v. Hutchinson</i>	204, 249	Jennison <i>v. Walker</i>	72, 276, 277, 312, 351, 464, 465, 489
Ingram <i>v. Morecraft</i>	346	Jermaine, <i>Waggoner v.</i>	428
Inhabitants of Bradfield, <i>Reg. v.</i>	76	Jersey City, <i>Den v.</i>	181
Inhabitants of Greenhow, <i>Reg. v.</i>	341	Jesser <i>v. Gifford</i>	359
Inhabitants of Hornsea, <i>Reg. v.</i>	341	Jewell <i>v. Lee</i>	367
Inhabitants of Mellor, <i>Rex v.</i>	26	Jewett <i>v. Jewett</i>	464
Ireson, <i>Newhall v.</i>	301, 425, 426	Jewett <i>v.</i>	464
Isenberg <i>v. East India House Estates Co.</i>	366	Johnson, <i>Carriek v.</i>	343
Isham, <i>Hewitt v.</i>	92	Codling <i>v.</i>	337
Ismay, <i>Mounsey v.</i>	2, 9, 18, 111, 132, 138, 141, 164	Comstock <i>v.</i>	121
Ithaca, <i>De Witt v.</i>	181	Gillett <i>v.</i>	301
Ivimey <i>v. Stocker</i>	20, 88	Jaqui <i>v.</i>	351
J.		<i>v. Jordan</i>	124, 126
Jack, <i>Yates v.</i>	287, 386, 404	<i>v. Kinnicutt</i>	334
Jackson <i>v. Duke of Newcastle</i>	366, 397, 402	<i>v. Lewis</i>	428
Garrett <i>v.</i>	135	<i>v. Long</i>	360
<i>v. Harrington</i>	306	Lord Manners <i>v.</i>	81, 85
<i>v. Hathaway</i>	130	Millechamp <i>v.</i>	19
Russell <i>v.</i>	270, 331	New River Co. <i>v.</i>	64, 253
<i>v. Stacey</i>	77, 314, 317	Parsons <i>v.</i>	101, 127
Jacksonville <i>v. Lambert</i>	242	Phipps <i>v.</i>	333
Jacobs <i>v. Allard</i>	239	<i>v. Rand</i>	304, 311
Vestry of St. Mary, New- ington, <i>v.</i>	6, 73, 181, 280	Sabine <i>v.</i>	307
Jamaica, <i>Hyde v.</i>	183	<i>v. Thoroughgood</i>	78
Jamaica Pond Aqueduct Co. <i>v.</i> Chandler	4, 461, 464	Johnston, <i>Baker v.</i>	182
Chandler <i>v.</i>	277, 351, 465	Dark <i>v.</i>	11, 89
James <i>v. Plant</i>	12, 102, 104, 459, 476	Joliet <i>v. Verley</i>	183
Williams <i>v.</i>	275, 279, 317, 324, 326, 455	Jolliffe, <i>Rex v.</i>	5, 73, 280
Jamieson, <i>Bailey v.</i>	491	Jones, <i>Brouwer v.</i>	867
Janes <i>v. Jenkins</i>	194, 207, 292, 407	City of Quincy <i>v.</i>	411
		<i>v. Crow</i>	239, 249
		Penn. R. R. <i>v.</i>	124
		<i>v. Percival</i>	72, 185, 277, 285, 347, 351, 444
		Robbins <i>v.</i>	182
		Seavey <i>v.</i>	99, 100
		Smart <i>v.</i>	90, 361
		<i>v. Tapling</i>	390
		Tapling <i>v.</i>	32, 144, 158, 190, 212, 290, 310, 481, 482
		<i>v. Wagner</i>	34, 222

Jordan, Johnson v.	124, 126	Knowles, Hamer v.	420
Judge v. Lowe	475	v. Richardson	80
		Stroyan v.	38, 410, 485
K.		Koonj, Rameshur v.	69
Kaler v. Beaman	311	Koonj Behari Pattuk, Rame-	
Karr, Roberts v.	95, 269	shur Pershad Narain Singh v.	262
Kauffman v. Griesemer	242	Kuhlman v. Hecht	96
Kay v. Oxley	104		
v. Stallman	408	L.	
Keats v. Hugo	79, 196, 207	Lacy v. Arnett	307, 474
Keep, Rutland v.	174	Lade v. Shepherd	182
Keesler, Curtis v.	164	Lady James Hay, Dyce v.	5, 280
Keiper v. Klein	198, 200	Ladyman v. Grave	12, 149, 174,
Kelk, Arcedeckne v.	397		216
v. Pearson	287, 289	Laffee, Houston v.	472, 473
Kellogg v. Malin	130	Laing, Whaley v.	4, 254, 440, 443
Kelly v. Donahoe	131	Laird v. Birkenhead R. R.	471
Ricker v.	472	Lake, Lee v.	182
Kelson, Watts v.	27, 104, 118, 268,	Lake Co., Gilford v.	307
	314, 456	Lake Shore, &c. R. R., On-	
Kempton, Burnham v.	302, 307,	thank v.	276
	366	Lamb v. Crosland	163, 165
Kennedy, Bliss v.	366	v. Walker	419
Kent v. Waite	99, 174, 184	Lambert, Crump v.	141, 189, 371, 380
Keppell v. Bailey	15, 21, 323	Jacksonville v.	242
Kern, Rerick v.	474	Lampman v. Milks	123, 193
Kerr, Alexander v.	425	Lamson, Davenport v.	325
Kidgill v. Moor	359, 444	Pratt v.	311
Kieffer v. Imhoff	123, 457	Lancaster Mills, Pitts v.	301
Kilburn v. Adams	132, 134	Laney v. Jasper	242
Killbuck v. Private Road	273	Lanfranchi v. Mackenzie	158, 213,
Kimball v. Cocheco R. R.	269		217, 281, 289, 290, 394
Kincaid, Allen v.	271	Langham, Sadler v.	271
Kinard, Smith v.	270	Langley v. Hammond	104, 107
King, Dyers' Co. v.	387	Lawson v.	150
Howell v.	324, 326	Perley v.	15, 184
v. McCully	366	Lanier v. Booth	122
v. Miller	135	Lapham, Anthony v.	301
Rochdale Canal Co. v.	91, 471	Miller v.	457
Kingscote, Dand v.	26, 110, 267,	Large v. Pitt	13, 93, 96, 145
	351	Larned v. Larned	490
Kinloch v. Nevile	172	Larned v.	490
Kinnicutt, Johnson v.	334	Larnard, Prentiss v.	366
Kirkendall v. Hunt	367	Lasala v. Holbrook	34, 38, 411
Kitchenman, McCarty v.	124	Lattimer v. Livermore	99
Kitchin, Lord Norbury v.	298, 358	Lattimore v. Davis	242
Klein v. Gehrung	208	Lauback, Miller v.	242
Havens v.	122	Laumier v. Francis	242
Keiper v.	198, 200	Law, Murgatroid v.	157
Knight v. Halsey	204	Lawrence v. Fairhaven	250
v. Heaton	461	v. Obee	463
Knipe, Ferrea v.	301	Lawson v. Langley	150

Lawton, Cuthbert <i>v.</i>	465	Livermore, Lattimer <i>v.</i>	99
<i>v.</i> Rivers	268	Livett <i>v.</i> Wilson	114, 173
<i>v.</i> Ward	328	Livingston <i>v.</i> McDonald	242
Le Fleming, Shuttleworth <i>v.</i>	9	<i>v.</i> Mayor of New York	265
Leadbitter, Wood <i>v.</i> 4, 90, 284,	361,	Lloyd, Barnes <i>v.</i> 99, 464, 465,	489
	469	Loach, Barnes <i>v.</i> 131, 290,	385
Learned, Coolidge <i>v.</i>	136	Lock, Smith <i>v.</i>	95
Leddell, Denton <i>v.</i>	122, 457	Lockington, Culverwell <i>v.</i>	122
Lee, Jewell <i>v.</i>	367	Lombard, Merrifield <i>v.</i> 67, 254, 366,	368, 436
<i>v.</i> Lake	182	London & Birmingham R. R.,	
Smith <i>v.</i>	351, 490	Semple <i>v.</i>	75
Whitney <i>v.</i>	339	London & North Western R. R.	
Wynstanley <i>v.</i>	157, 160	<i>v.</i> Ackroyd	226, 422
Leech <i>v.</i> Schweder 23, 202, 400,	402	Nield <i>v.</i>	48, 59
Waugh <i>v.</i>	182	Long, Johnson <i>v.</i>	360
Leeds, Read <i>v.</i>	5, 130	Long Island R. R., Pitkin <i>v.</i>	89
Leeds Corporation, Atty. Gen. <i>v.</i>	437	Wagner <i>v.</i>	241, 243
Lefever, Bryant <i>v.</i>	188	Lonsdale Co. <i>v.</i> Moies	10
Legg <i>v.</i> Horn	136	Loomis, Olmsted <i>v.</i>	311
Legh, Courtauld <i>v.</i>	210	Looney, Ganley <i>v.</i>	312
Lehigh Valley R. R. <i>v.</i> McFar-		Lord, Doyle <i>v.</i> 121, 197, 205,	407
lan	173	Hill <i>v.</i>	7, 69
Leonard, Hurlbut <i>v.</i>	250	Lord Byron, Robinson <i>v.</i>	430
<i>v.</i> Leonard 99, 174, 271,	345	Lord Manners <i>v.</i> Johnson	81, 85
Leonard <i>v.</i> 99, 174, 271,	345	Lord Montfort, Sutton <i>v.</i>	163
Leroy <i>v.</i> Platt	124	Lord Norbury <i>v.</i> Kitchin	298, 358
Leslie, Shed <i>v.</i>	312	Lothrop, O'Linda <i>v.</i>	95, 266
Lessees of Lord Berkeley, Mor-		Louch, Duncan <i>v.</i>	17, 75, 76
ris <i>v.</i>	397	Lovell <i>v.</i> Smith 467, 468,	489, 491
Lesure, Ruggles <i>v.</i>	4, 473	Lovering, Carlyon <i>v.</i> 20, 142,	158,
Lethridge, Chichester <i>v.</i>	75, 317		185
Levan, Seibert <i>v.</i>	123	Low, Commonwealth <i>v.</i>	181
Lewis, Cross <i>v.</i>	114, 203, 206	Rust <i>v.</i>	79
Johnson <i>v.</i>	428	Lowe <i>v.</i> Carpenter	112, 148
<i>v.</i> Price	205	Judge <i>v.</i>	475
<i>v.</i> Stein	436	Lowell, Hildreth <i>v.</i>	6, 130
Lewiston, Proctor <i>v.</i>	182	Hobbs <i>v.</i>	181, 182
Lidbetter, Cavey <i>v.</i>	30, 374, 375	<i>v.</i> Smith	461
Lide <i>v.</i> Hadley	270	Luce, Nichols <i>v.</i> 269, 270, 271,	350,
Liford's case	92		351
Liggins <i>v.</i> Inge	90, 471	Lucy, Peers <i>v.</i>	7
Lightowler, Crossley <i>v.</i>	71, 119,	Ludlow <i>v.</i> Hudson R. R.	294
308, 358, 372, 424, 435,	439,	Lund, Hall <i>v.</i>	111
	462	Luther <i>v.</i> Winnisimmet Co.	243
Lilley, Waters <i>v.</i>	7, 186	Luttrel, Cottel <i>v.</i>	304
Lillywhite <i>v.</i> Trimmer	437	Luttrel's case,	456
Lincoln <i>v.</i> Lincoln	313	Lyford, Odiorne <i>v.</i>	302
Lincoln <i>v.</i>	313	Lyman <i>v.</i> Arnold	130
Stowell <i>v.</i>	301, 425	Lynch <i>v.</i> Mayor	241
Lingwood <i>v.</i> Stowmarket Co.	436	Trustees <i>v.</i>	99
Linzee <i>v.</i> Mixer	367	Lynes, Ray <i>v.</i>	210
Lipscombe, Bland <i>v.</i>	7	Lyon <i>v.</i> Fishmongers' Co.	446
Little Miami R. R., Easter <i>v.</i>	79	<i>v.</i> McLaughlin	366
Littlefield, Riddle <i>v.</i>	121		

M.		
Maberley v. Dowson	167	Mayfield v. Robinson 89, 284
Mabie v. Matteson	11	Maynard v. Esher 198
Mackenzie, Lanfranchi v.	158, 213, 217, 281, 289, 290, 394	Mayo, Hovey v. 10
Macomber v. Godfrey	55	Mayor, Lynch v. 241
Macord, Roberts v.	188, 216	Mitchell v. 232, 411
Madison R. R., Gillham v.	242	Mayor of Baltimore v. Appold 296
Mahan v. Brown	32, 33, 131, 190, 203, 205	Mayor of Bath, Cook v. 462, 463
Mahon v. N. Y. Cen. R. R.	131	Mayor of Brooklyn, Radcliff v. 34, 411
Maloney, Dubuque v.	182	Mayor & Commonalty of Lon- don, Peyton v. 44
Malin, Kellogg v.	130, 192, 198	Mayor & Corporation of Bridg- north, Ellis v. 15
Manchester & Sheffield R. R., Saxby v.	360, 427	Mayor of Birmingham v. Allen 36
Manchester Carriage Co., El- lis v.	192, 198	Mayor of London v. Pewterers' Co. 215
Manning v. Smith	124, 457	Mayor of New York, Livings- ton v. 265
v. Wasdale	7	Mayor, &c. of Plymouth, Atty. Gen. v. 109
Marclay v. Shults	307	Mayor of Plymouth, Blatch- ford v. 25, 275
Marquardt, Morrison v.	2, 198, 208	McAtee, Maxwell v. 331
Marquis, Rexford v.	464	McBryde, Warner v. 199
Marshall, Brewer v.	82, 367	McCallum v. Germantown Wa- ter Co. 67, 258
Davies v.	91, 384	McCarty v. Kitchenman 124
Farrand v.	34	McCauley, Huff v. 7, 69, 88
Herrick v.	99	McChesney, O'Reiley v. 239
Morse v.	306	McClenaghan, Pearce v. 460
v. Peters	299	McClintock, Dodge v. 472
v. Trumbull	94	McCready v. Thomson 207
v. Ulleswater Steam Nav. Co.	320	McCully, King v. 366
Marshfield, Thomas v.	134	McDermott, Western v. 81
Marstin, French v.	326	McDonald, Livingston v. 242
Marston v. Gale	474	Townsend v. 250
Martin, Clark v.	367	McDuffie, Pingree v. 122, 269
v. Goble	281, 290, 405, 474	McFarlan, Lehigh Valley R. R. v. 173
v. Headon	386	McFarlin v. Essex Co. 7
v. Riddle	242	McGillivray v. Millin 241
Marten, Thurber v.	301	McGregor v. Wait 114
Martyn, Gaved v.	20, 25, 56, 61, 88, 132, 170, 173, 244, 251	McGuire, Baker v. 307
Marvin v. Brewster Min. Co.	34, 222, 294	v. Grant 45, 411
Mason, Atlantic Mills v.	459	McKechnie v. McKeyes 302
v. Hill	56, 249, 252, 358, 424, 462	McKee, Capers v. 346
v. Holt	473	McKeyes, McKechnie v. 302
v. Shrewsbury & Here- ford R. R.	16, 58, 61, 88, 142, 167, 251, 449, 468	McLaughlin, Lyon v. 366
Matteson, Mabie v.	11	Randall v. 125
Matthews, Cox v.	94, 191, 384	McLean v. Davis 462
Maxwell v. McAtee	331	McLeod, Hale v. 263
		Hall v. 182, 271
		Waugh v. 182
		McMillan v. Cronin 281, 285, 346

McMurray, Baxendale v.	309, 456	Mills, Pomeroy v.	181
McNab v. Adamson	250, 302	Milnor, N. Y. Life Ins. Co. v.	269, 325, 452
McQuestein, Burnham v.	134	Miner v. Gilmour	297, 300
Mebane v. Patrick	165	Thompson v.	123
Medway Nav. Co. v. Earl of Romney	296	Minsterley, Wilde v.	46
Mellor v. Watkins	469	Mitcalf v. Westaway	4, 284
Melvin v. Proprietors of Locks & Canals	174	Mitchell v. Mayor	232, 411
v. Whiting	7, 165	Parker v.	112, 148
Mercer v. Woodgate	314	v. Rome	195
Merchant Taylors' Company, Truscott v.	32, 211, 214	Mixer, Linzee v.	367
Merrifield v. Lombard	67, 254, 366, 368, 436	Moffatt, Gayford v.	12, 14, 26, 267, 320
v. Worcester	438	Moffett v. Brewer	429
Merriweather, Evans v.	301	Moies, Lonsdale Co. v.	10
Merryweather, Rugby Char-ity v.	181	Mold v. Wheatcroft	471
Mertz v. Dorney	307	Monmouthshire Canal Co. v. Harford	170, 174, 175
Mesier, Campbell v.	295	Moody v. Steggles	78
Metcalf v. Bingham	273	Moor, Kidgill v.	359, 444
Metropolitan Association v. Petch	359, 395	Moore, Allis v.	165
Metropolitan Board of Works, Hoare v.	78	v. Hall	404
v. Metropolitan R. R.	422	Pillsbury v.	428
Reg. v.	62	v. Rawson	177, 463, 479, 483
Metropolitan R. R., Metropolitan Board of Works v.	422	v. Webb	239
Middleton v. Gregorie	250	Wright v.	303, 429
Midland R. R., Bell v.	359, 360, 444	Mordant, Westbourne v.	427
v. Checkley	422	Morecraft, Ingram v.	346
Rangeley v.	8, 73, 87	Morgan, Davis v.	96, 467
Miles v. Tobin	384	Morland, Williams v.	252, 355, 357, 358, 424, 430
Milks, Lampman v.	123, 193	Morley v. Pragnal	371, 380
Mill v. Commissioners of New Forest	159, 163	Morrill v. Hurley	241
Mill River Woolen Co. v. Smith	299	Morris, Bickett v.	57, 61, 358, 424, 430
Millechamp v. Johnson	19	v. Edgington	28, 97, 98, 101, 268, 278
Miller v. Auburn & Syracuse R. R.	474	French v.	10
v. Bristol	346	Hieatt v.	208, 228
v. Brown	229, 471, 472	v. Lessees of Lord Berkeley	397
King v.	135	Smith v.	145
v. Lapham	457	Morrison v. Marquardt	2, 198, 208
v. Laubach	242	Morse v. Copeland	4, 90, 472
v. Miller	301	v. Marshall	306
Miller v.	301	v. Ranno	182
Smith v.	134	v. Williams	166
Stacey v.	182	Morss, Crippen v.	93
v. Washburn	314, 339	Morton, Smart v.	34, 43, 222, 294
Millin, McGillivray v.	241	Moses v. Sanford	95
Mills, Burr v.	99, 124	Mosier v. Caldwell	65
		Mott v. Shoolbred	358, 444, 445
		Mounsey v. Ismay	2, 9, 18, 111, 132, 138, 141, 164

Moxhay, Tulk v.	81	Newcomen v. Coulson	315, 455
Mullen, Stearns v.	321	New Haven, Guthrie v.	183
v. Stricker	197, 200, 208	v. Sargent	10
Mumford v. Oxford, Worcester & Wolverhampton R. R.	141	New Ipswich Woolen Factory v. Bachelder	48, 123
v. Whitney	89, 473	New Orleans, Bowman v.	242
Munroe v. Stickney	425	New River Co. v. Johnson	64, 253
Munsell, Edson v.	163	Newburyport, Parks v.	241
Munson v. Hungerford	182	Newell, Winslow v.	99
Murchie v. Black	44, 228, 413, 414	Newhall v. Ireson	301, 425, 426
Murgatroid v. Law	157, 258	Newman, Saunders v.	304, 456, 468
Murgatroyd v. Robinson	12, 161, 239, 258	Tucker v.	360
Murphy, Beard v.	242	Newmarsh v. Brandling	470
Murray, Dilling v.	56	Newson, Saunders v.	468
Mussey v. Union Wharf	450	Nichol, Atty. Gen. v.	383, 387, 397
Myer v. Whitaker	299	v. Canada Southern R. R.	241
Myers, Clinton v.	65	Nicholas v. Chamberlain	110
v. Gemmel	197, 205	Nichols v. Aylor	173
		v. Luce	269, 270, 271, 350, 351
N.		Nicholson, Constable v.	7, 164
N. H. & Northampton Co., Foot v.	473	Davidson v.	113, 165
N. J. R. R., Atty. Gen. v.	368	Nicklin v. Williams	416, 417, 420
N. Y. &c. R. R., Eggleston v.	472	Nield v. London & North West- ern R. R.	48, 59
N. Y. Cen. R. R., Bissell v.	182	Nightingale, Parker v.	82, 89, 367
Mahon v.	131	Noll v. Dubuque, &c. R. R.	464
Waffle v.	241	Nolley, Callaway Co. v.	461
N. Y. Life Ins. Co. v. Milnor	269, 325, 452	Noonan, Curtis v.	472
Napier v. Bulwinkle	207	North, Bishop v.	128, 351
Nash v. Peden	75	Daniel v.	113, 163, 165
National Guaranteed Manure Co. v. Donald	159, 163, 164, 451	Westbrook v.	130
National Provincial Plate Glass Ins. Co. v. Prudential Assur- ance Co.	482	North Eastern R. R., Elliot v.	226
Neal, Ward v.	208, 209	v. Elliott	39
Neale v. Seeley	78	Northam v. Hurley	108, 275, 426
Nelson, Williams v.	250	Northern Cen. R. R., Sapp v.	163
Neponset Man. Co., Bolivar Man. Co. v.	115, 136, 249, 304	Northern Trans. Co. v. Chicago	34
Nesbitt v. Trumbo	271	Northumberland, State v.	343
Nettlefold, Selby v.	332, 345, 449	Northwestern R. R., Chica- go v.	173
Nettleton v. Sikes	470	Norton v. Volentine	249
Neville, Kinloch v.	172	Norway Plains Co. v. Bradley	425, 432
Neville, Rex v.	373	Norwood, Sanders v.	5
Nevins v. Peoria	242	Nottingham, Hall v.	19
New Albany R. R. v. Peterson	253	Nowlen, Phelps v.	65, 253
New Bedford, Haskell v.	438	Noyes, Pickering v.	7
Newcastle, Jackson v.	366	v. Stillman	429
		v. Ward	183
		Nudd v. Hobbs	181
		Nuttall v. Bracewell	48, 53, 310
		Nye, Ball v.	47

O.			
Oakley v. Adamson	96	Palmer v. Fletcher	94, 191, 192, 384
v. Stanley	99	v. Paul	94, 191
Obee, Lawrence v.	463	v. Wetmore	197
Occum Man. Co. v. Sprague		Panton v. Holland	411
Man. Co.	472	Parish Clerks' Co., Plasterers' Co. v.	179, 215
Odin, Story v.	192, 205, 407	Parish of the Advent, Harper v.	134
Odiorne v. Lyford	302	Parish of Trumpington, Roads v.	5
Ody, Wells v.	80, 397	Parke, Warburton v.	174
Ogburn v. Connor	242	Parker v. Bennett	126
Ogden v. Grove	271	v. Boston & Maine R. R.	253
O'Hara, Pope v.	450	Clark v.	94
Old Colony R. R., Hennessey v.	265	v. Foote	135, 203, 209
Oldfield's case	348	v. Framingham	266, 359
Oldroyd, Hale v.	462, 468, 489	v. Griswold	301
O'Linda v. Lothrop	95, 266	v. Mitchell	112, 148
Oliver v. Hook	11, 101, 122	v. Nightingale	82, 89, 367
v. Pitman	270, 271	Press v.	121
Olmsted v. Loomis	311	Ritger v.	2, 488
Olney, Whitney v.	121	Rodgers v.	266
O'Neil v. Harkins	411	v. Smith	95, 266, 397
Onley v. Gardiner	112, 153, 173, 174, 176	Parkins v. Dunham	464
Onslow, Beddingfield v.	359	Parks v. Bishop	316
Onthank v. Lake Shore, &c.		v. Newburyport	241
R. R.	276	Whitehead v.	248, 275, 426
Ormond, Allen v.	76, 445	Parshley, Woodbury v.	472
O'Reiley v. McChesney	239	Parsons v. Johnson	101, 127
O'Rorke v. Smith	127, 270	Snow v.	239
Orr, Wickersham v.	474	Partridge v. Gilbert	228, 295
Osborn v. Hart	271	v. Scott	39, 42, 140, 165, 229, 230
v. Wise	319, 348	Pash, Binckes v.	390
Osburn, Witham v.	272	Pastorius v. Fisher	425
Overdeer v. Updegraff	124	Patrick, Mebane v.	165
Owen, Embrey v.	53, 56, 69, 275, 296, 300, 358, 426	Patterson, Trask v.	271
v. Field	10, 367, 368, 464, 465, 489	Pattisson v. Gilford	365
Smith v.	82, 216	Paul, Palmer v.	94, 191
Oxford, Worcester & Wolverhampton R. R., Mumford v.	141	Pawson, Senior v.	366, 387
Oxley, Kay v.	104	Payne, Dovaston v.	8
P.		v. Sheddon	177
Pagham Commissioners Rex v.	59, 432	Thayer v.	122
Paige v. Weathersfield	183	Peake, Hunt v.	34
Paine v. Boston	207	Pearce, Desloge v.	472
v. Woods	299	v. McClenaghan	460
Painter, Darlington v.	302	Pearsall, Post v.	15, 69, 114, 186
Palk v. Skinner	154	Pearson, Cheever v.	473
		Kelk v.	287, 289
		v. Spencer	117, 131, 269, 349, 350, 476
		Pease, Ashley v.	312
		Peck, Butler v.	242
		v. Conway	82, 99, 367
		Walkins v.	134

Peden, Nash <i>v.</i>	75	Pitt, Large <i>v.</i>	13, 93, 96, 145
Peers <i>v.</i> Lucy	7	Pittenger, Robeson <i>v.</i>	193, 208,
Pennsylvania R. R. <i>v.</i> Jones	124		408
Peoria, Nevins <i>v.</i>	242	Pitts <i>v.</i> Lancaster Mills	301
Percival, Jones <i>v.</i>	72, 185, 277, 285,	Plant, James <i>v.</i>	12, 102, 104, 459,
	347, 351, 444		476
Perkins <i>v.</i> Dow	301	Plasterers' Co. <i>v.</i> Parish Clerks'	
Perley <i>v.</i> Chandler	73, 130	Co.	179, 215
<i>v.</i> Hilton	250	Platt, Farnum <i>v.</i>	345
<i>v.</i> Langley	15, 184	Leroy <i>v.</i>	124
Pernam <i>v.</i> Wead	270, 271	Plimpton <i>v.</i> Converse	124, 457
Perrin <i>v.</i> Garfield	465	Plumleigh <i>v.</i> Dawson	425
Perrine <i>v.</i> Farr	273	Plummer <i>v.</i> Webb	475
Perry, Beadel <i>v.</i>	397, 401	Plympton <i>v.</i> Converse	134
Petch, Metro. Asso. <i>v.</i>	359, 395	Pocasset Man. Co., Cotton <i>v.</i>	302,
Peteler, Gilbert <i>v.</i>	89, 367		325
Peters, Marshall <i>v.</i>	299	Polden <i>v.</i> Bastard	118, 131
Peterson, New Albany R. R. <i>v.</i>	253	Pollard <i>v.</i> Barnes	174, 177
Pettibone <i>v.</i> Smith	56	Pomeroy <i>v.</i> Mills	181
Pettigrew <i>v.</i> Evansville	242	Pomfret <i>v.</i> Ricroft	17, 110, 285,
Pettingill <i>v.</i> Porter	270		346, 444
Pewterers' Co., Mayor of Lon-		Pond, Richardson <i>v.</i>	78, 207, 330
don <i>v.</i>	215	Poole <i>v.</i> Huskinson	181
Peyton <i>v.</i> Mayor & Common-		Thomas <i>v.</i>	266
alty of London	44	Poor, Pitman <i>v.</i>	472
Pfaff, Bloch <i>v.</i>	251	Pope, Bury <i>v.</i>	205
Phelps <i>v.</i> Nowlen	65, 253	<i>v.</i> Devereux	490
Tourtellot <i>v.</i>	311	<i>v.</i> O'Hara	450
Phейsey <i>v.</i> Vicary	131, 449, 488	Popplewell <i>v.</i> Hodgkinson	39, 94,
Phila. Ex. Co., Gowen <i>v.</i>	134, 182		227
Phillips, Frewen <i>v.</i>	14, 32, 174,	Poritt, Holker <i>v.</i>	49, 55
	211, 214	Porter, Deshon <i>v.</i>	312
<i>v.</i> Bordman	229	<i>v.</i> Durham	242
<i>v.</i> Phillips	123	Finlinson <i>v.</i>	109, 110, 276
Phillips <i>v.</i>	123	Pettingill <i>v.</i>	270
Phipps <i>v.</i> Johnson	333	Smith <i>v.</i>	321
Pickering <i>v.</i> Noyes	7	Taylor <i>v.</i>	271
Pico <i>v.</i> Colimas	285	Portland Man. Co., Webb <i>v.</i>	366
Pierce <i>v.</i> Cloud	135	Portmore <i>v.</i> Bunn	93
Collier <i>v.</i>	122, 200	Ports., Gt. Falls & Conway R.	
<i>v.</i> Selleck	452	R., Blaisdell <i>v.</i>	474
Walker <i>v.</i>	444	Post <i>v.</i> Pearsall	15, 69, 114, 186
Pierre <i>v.</i> Fernald	135, 206, 220	Potter, Stockport Waterworks	
Pierson <i>v.</i> Glean	429	Co. <i>v.</i>	4, 53, 249, 254, 310, 436
Piggott <i>v.</i> Stratton	81	Pottmeyer, State <i>v.</i>	299
Pigot, Sury <i>v.</i>	56, 448, 457	Potts <i>v.</i> Smith	32, 202, 216
Pillsbury <i>v.</i> Moore	428	Powell <i>v.</i> Bagg	173
Pincke, Shove <i>v.</i>	108	Powell Duffryn Steam Coal Co.	
Pingree <i>v.</i> McDuffie	122, 269	<i>v.</i> Taff Vale R. R.	128
Pinnington <i>v.</i> Galland	98, 267, 350	Powell <i>v.</i> Sims	195, 208
Piper, Chestnut Hill, &c. Co. <i>v.</i>	134	Pragnal, Morley <i>v.</i>	371, 380
Pitkin <i>v.</i> Long Island R. R.	89	Pratt, First Parish in Med-	
Pitman, Oliver <i>v.</i>	270, 271	ford <i>v.</i>	134
<i>v.</i> Poor	472	<i>v.</i> Lamson	311

Pratt, Reg. v.	181	Ramsbotham, Broadbent v.	55, 241
v. Sanger	351	Rand, Johnson v.	304, 311
Preble v. Reed	124	Randall, Brice v.	185
Prentice, Collins v.	122, 269, 271	v. McLaughlin	125
v. Geiger	239, 258, 309	v. Sanderson	78, 207
Prentiss v. Larnard	366	Warshauer v.	464
Prescott v. White	239, 285, 429	Rangeley v. Midland R. R. Co.	8,
v. Williams	56, 239, 285, 429		73, 87
Press v. Parker	121	Rankin, Charless v.	45, 411
Price, Lewis v.	205	Ranno, Morse v.	182
Primrose, Clawson v.	208, 407	Raritan, &c. Co., Veghte v.	465, 472
Prince v. Case	473	Rawson v. Bell	471
Pringle v. Wernham	397	Moore v.	177, 463, 479, 483
Prior, Rosewell v.	360, 397	Rawstron v. Taylor	51, 55, 241
Pritchard, Durell v.	366	Ray v. Fletcher	306
Private Road, Killbuck v.	273	v. Lynes	210
Proctor v. Andover	272	v. Sweeny	208
v. Hodgson	28, 268, 269, 486	Raymond, Fitzhugh v.	276
v. Lewiston	182	Hodges v.	239, 429
Proprietors of Locks & Canals,		Re Penny and the South East-	
Melvin v.	174	ern R. R. Co.	33, 84
Proud v. Bates	222	Read, Buell v.	302
Hollis v.	324	v. Leeds	5, 130
Wilkinson v.	5	Roberts v.	356, 420
Prov. Aqueduct Co., Dexter v.	253	Redington, Carleton v.	429, 474
Prov. Gas Co. v. Thurber	79, 131	Reed, Battishill v.	173, 176, 359
Prov. Tool Co. v. Corliss Steam		Bell v.	35
Engine Co.	127	Preble v.	124
Prudential Assurance Co., Nat.		Rees v. Chicago	182
Provincial Plate Ins. Co. v.	482	Reeves, White v.	450
Purcell, Bridges v.	473	Ref. Church v. Schoolcraft	99
Pursell, Fox v.	384	Reg. v. Aire & Calder Nav. Co.	422
Putnam v. Bowker	134	v. Inhabitants of Brad-	
Pyer v. Carter	115, 179, 199	field	76
		v. Inhab. of Greenhow	341
		v. Inhab. of Hornsea	341
		v. Metro. Board of Works	62
		v. Pratt	181
		v. United Kingdom Elec-	
		tric Tel. Co.	332
		Regina v. Chorley	25, 75, 76, 177,
			461, 465, 485
		Reid v. Gifford	366, 382
		Reignolds v. Edwards	178, 468
		Reimer v. Stuber	114, 165
		Rennyson v. Rozell	408
		Renshaw v. Bean	310, 388
		Rerick v. Kern	474
		Rex v. Bognor Commissioners	59
		v. Bristol Dock Co.	433
		v. Cross	373
		v. Inhabitants of Mellor	26
		v. Jolliffe	5, 73, 280
		v. Neville	373

Q.

Queen's College, Oxford, War-	
rick v.	180
Quimby, Vt. Cen. R. R. v.	130

R.

Race, Campbell v.	343
v. Ward	7, 64, 160
Radcliff v. Mayor of Brooklyn	34,
	411
Radcliffe, Rochdale Canal Co. v.	159
Rameshur v. Koonj	69
Rameshur Pershad Narain	
Singh v. Koonj Behari Pat-	
tuk	262

Rex v. Pagham Commissioners	59,	Roberts v. Macord	188, 216
	432	v. Read	356, 420
v. Rosewell	406	v. Roberts	346
v. Tippet	455	Roberts v.	346
Trafford v.	54, 59	Robertson, Dugdale v.	223
v. Wharton	429	Robeson v. Pittenger	193, 208, 408
Rexford v. Marquis	464	Robins, Brown v.	38, 409, 410, 485
Reynolds, Guest v.	190, 209	Ward v.	147
v. Reynolds	130, 273	Robinson, Chauntler v.	17
Reynolds v.	130, 273	v. Grave	191
Rhea v. Forsyth	366	Hazard v.	457
Rhoads, Worrall v.	166	Heath v.	457
Rhodes, Barlow v.	8, 98, 100, 103,	v. Lord Byron	430
	476	Mayfield v.	89, 284
v. Whitehead	297	Murgatroyd v.	12, 161, 239,
Rich, Blake v.	130		258
Duinneen v.	88, 472	v. Swope	273
Richard, Barrow v.	367	Robson v. Whittingham	397
Richards, Chasemore v.	54, 62, 64,	Rochdale Canal Co. v. King	91, 471
	65, 68, 135, 242, 248, 253	v. Radcliffe	159
Colburn v.	301, 429	Rodgers v. Parker	266
Compton v.	192	Rogers v. Bancroft	311
v. Fry	147	Howard v.	266
v. Harper	225	v. Sawin	207
v. Rose	228	v. Sinsheimer	228, 229
Richardson, Barker v.	163	v. Taylor	26, 42, 185, 229,
v. Bigelow	312, 359, 444, 445		410
Hayes v.	473	Rolle v. Whyte	25
Knowles v.	80	Rome, Mitchell v.	195
v. Pond	78, 207, 330	Ropes, Sharp v.	367
v. Vt. Cen. R. R.	34, 411	Rose, Cousens v.	314
Richart v. Scott	45, 233, 411	v. Groves	446
Richmond Man. Co. v. Atlantic		Richards v.	228
De Laine Co.	368	Rosewell v. Prior	360, 397
Richter, Eulrich v.	243	Rex v.	406
Ricker, Heath v.	79	Rowbotham v. Wilson	26, 34, 44,
v. Kelly	472		95, 129, 224, 293, 294
Ricroft, Pomfret v.	17, 110, 285,	Rowell, Union House v.	79
	346, 444	Royalton, Blodgett v.	183
Riddle v. Littlefield	121	Royce v. Guggenheim	200
Martin v.	2	Rozell, Rennyson v.	408
Ritger v. Parker	2, 488	Rugby Charity v. Merryweather	181
Rivers, Lawton v.	268	Ruggles v. Lesure	4, 473
Riviere v. Bower	83, 408	Runnels, Bullen v.	311
Roads v. Parish of Trumpington	5	Russ v. Dyer	126
Roath v. Driscoll	65, 253	Smith v.	307
Robbins v. Borman	6, 130	Russell, Cawkwell v.	282, 310, 362
v. Jones	182	v. Harford	12
Roberts, Brumfitt v.	8	v. Jackson	270, 331
v. Clarke	174	v. Scott	303
Colchester v.	324, 328	Rust v. Low	79
v. Davey	109	Rutland v. Keep	174
v. Haines	224, 294	Ryckman v. Gillis	45, 222, 294
v. Karr	95, 269	Ryding, Harris v.	34, 43, 222, 294

S.		
Sabine <i>v.</i> Johnson	307	Seeley, Holmes <i>v.</i> 185, 269, 343, 346, 350, 452
Sabron, Barnes <i>v.</i>	241	Neale <i>v.</i> 78
Sackett, Bellows <i>v.</i>	242, 251	Woodward <i>v.</i> 472
Sadler <i>v.</i> Langham	271	Seibent <i>v.</i> Levan 123
Safford, Williams <i>v.</i>	343	Seidensparger <i>v.</i> Spear 473
Salem & Danvers Aqueduct Co., Fay <i>v.</i>	299	Selby <i>v.</i> Nettlefold 332, 345, 449
Salisbury <i>v.</i> Andrews 330, 335		Selden, Cromwell <i>v.</i> 311
Salisbury Man. Co., Barrett <i>v.</i>	66	<i>v.</i> Dela. & Hud. Canal Co. 474
Salisbury Man. Co., Bassett <i>v.</i>	248	Selfe, Walter <i>v.</i> 30, 371, 378, 380
Salters' Co. <i>v.</i> Jay	211	Selleck, Pierce <i>v.</i> 452
Sampson <i>v.</i> Hoddinott 24, 51, 157, 252, 275, 300, 358, 424		Seller, Holms <i>v.</i> 96, 108
San Francisco <i>v.</i> Calderwood	182	Simple <i>v.</i> London & Birming- ham R. R. 75
Sanders <i>v.</i> Norwood	5	Senhouse <i>v.</i> Christian 326, 351
Sanderson, Randall <i>v.</i>	78, 207	Senior <i>v.</i> Pawson 366, 387
Sandford, Dyer <i>v.</i>	4, 472, 489	Seymour <i>v.</i> Carter 473
Gormley <i>v.</i>	242	Shadwell <i>v.</i> Hutchinson 359, 360
Moses <i>v.</i>	95	Shafto, Taylor <i>v.</i> 223
Sanger, Pratt <i>v.</i>	351	Sharp, Brakely <i>v.</i> 127, 269
Sapp <i>v.</i> Northern Cen. R. R.	163	<i>v.</i> Ropes 367
Sargent <i>v.</i> Ballard 132, 136, 174		Sharpe <i>v.</i> Hancock 129
New Haven <i>v.</i>	10	Shaw, Bealey <i>v.</i> 24, 56, 57, 249, 275, 279, 302
Saunders <i>v.</i> Newman 304, 456, 468		Sheard, Drewett <i>v.</i> 53, 463, 465
Wood <i>v.</i> 98, 276, 278, 281		Shears <i>v.</i> Wood 430
Savage, Simpson <i>v.</i>	359, 381	Shed <i>v.</i> Leslie 312
Savill, Alder <i>v.</i>	305	Sheddon, Payne <i>v.</i> 178
Sawin, Rogers <i>v.</i>	207	Sheffield Gas Consumers' Co., Atty. Gen. <i>v.</i> 435
Saxby <i>v.</i> Manchester & Shef- field R. R.,	360, 427	Shelby <i>v.</i> State 490
Saxon, Wilson <i>v.</i>	181	Shepherd, Lade <i>v.</i> 182
Sayles, Hill <i>v.</i>	367	Sherwood <i>v.</i> Burr 250
Scheuley <i>v.</i> Commonwealth	359	<i>v.</i> Vliet 250
Schofield, Hopwood <i>v.</i>	359	Shields <i>v.</i> Arndt 243, 367
Schoolcraft, Ref. Church <i>v.</i>	99	Shipman <i>v.</i> Beers 197
Schweder, Leech <i>v.</i> 23, 202, 400, 402		Shippam, Hewlins <i>v.</i> 1, 3, 89
Schwoerer <i>v.</i> Boylston Market Asso.	367	Shoolbred, Mott <i>v.</i> 358, 444, 445
Scott <i>v.</i> Beutel	11	Short, Siddons <i>v.</i> 94, 223
Partridge <i>v.</i> 39, 42, 140, 165, 229, 230		<i>v.</i> Woodward 306
Richart <i>v.</i> 45, 233, 411		Shove <i>v.</i> Pincke 108
Russell <i>v.</i>	303	Shreve, Hulme <i>v.</i> 425
State <i>v.</i>	181	Shrewsbury & Hereford R. R., Mason <i>v.</i> 16, 58, 61, 88, 142, 167, 251, 449, 468
Screven <i>v.</i> Gregorie	452	Shrieve <i>v.</i> Stokes 45, 411
Seaman <i>v.</i> Vawdrey	462	Shugar, Grand Junction Canal Co. <i>v.</i> 40, 55, 67
Sear, Davies <i>v.</i>	269	Shults, Hynds <i>v.</i> 307
Seavey <i>v.</i> Jones	99, 100	Marcly <i>v.</i> 307
Seddon, Aspden <i>v.</i> 45, 222, 228, 294		Shuttleworth <i>v.</i> Le Fleming 9
Seeley <i>v.</i> Bishop	122	Sibley <i>v.</i> Ellis 136
		Siddons <i>v.</i> Short 94, 223

Sikes, Nettleton v.	470	Smyles v. Hastings	96, 266, 269, 270, 350, 464
Silverstone, Chase v.	65, 253	Snow v. Parsons	239
Simmons, Corp. of Yarmouth v.	450	Snowden v. Wilas	474
v. Sines	269	Snyder v. Warford	269
Simonds, Giles v.	470, 474	Solomon v. Vintners' Co.	231, 236
Simper v. Foley	215, 397, 459, 476	Sorrell, Thomas v.	4
Simpson v. Savage	359, 381	Soule, Gentleman v.	182
Sims, Coles v.	81	South Metropolitan Cemetery	
Powell v.	195, 208	Co. v. Eden	321, 454
Sines, Simmons v.	269	South Reading, Hartshorn v.	368
Singers, Stokoe v.	177, 478	Spaulding v. Abbott	99, 100
Sinsheimer, Rogers v.	228, 229	Spear, Seidensparger v.	473
Sipe, Haverstick v.	207	Speer, Bowlsby v.	241
Sipperly, Dennis v.	443	Spencer, Elmhirst v.	366, 426
Skinner, Palk v.	154	Pearson v.	117, 131, 269, 349, 350, 476
Skull v. Glenister	98, 284, 321, 324	Spensley v. Valentine	11
Slackman v. West	164	Spokesfield, Hayford v.	468, 489
Sloan v. Holliday	316	Spooner v. Day	157
Smart v. Jones	90, 361	Foster v.	92
v. Morton	34, 43, 222, 294	Turner v.	33, 84, 291
Smeaton, Weller v.	382	Sprague Man. Co., Occum Man.	
Smith, Ackroyd v.	8, 10, 15, 22, 73, 321	Co. v.	472
v. Adams	253	Spring, Staple v.	428
v. Barnes	490	Springfield v. Harris	301
Bates v.	241	Springett, Bishop v.	160
Brigham v.	122, 269, 270	Sprot, Caledonia R. R., v.	94
v. Darby	45, 222, 223, 294	St. Charles, Becker v.	182
Fentiman v.	3, 89, 90	St. George's Vestry, Hamil-	
Harris v.	101, 122	ton v.	346
Hervey v.	78, 361, 471	St. Helen's Smelting Co. v. Tip-	
v. Kinard	270	ping	31, 188, 371, 373, 379, 381
v. Lee	351, 490	St. Mary, Newington, v. Jacobs	73, 181
v. Lock	95	St. Pancras Guardians, Ard-	
Lovell v.	467, 468, 491	ley v.	77, 96, 314
Lowell v.	461, 468, 489, 491	St. Paul, Baker v.	182
Manning v.	124, 457	Wilder v.	182, 263
Mill River Woolen Co. v.	299	St. Paul Ins. Co., Dawson v.	339, 368
v. Miller	134	Stacey, Back v.	397
v. Morris	145	Jackson v.	77, 314, 317
O'Rorke v.	127, 270	v. Miller	182
v. Owen	82, 216	Stafford v. Coyney	181, 183
Parker v.	95, 266, 397	Staffordshire & Worcestershire	
Pettibone v.	56	Canal Co. v. Birmingham	
v. Porter	321	Canal Co.	159
Potts v.	32, 202, 216	Staffordshire Potteries Water-	
v. Russ	307	works Co., Clowes v.	364, 436
v. Smith	78	Stallman, Kay v.	408
Smith v.	78	Standiford v. Goudy	122
v. Thackerah v.	355, 410, 411, 485	Stanley, Oakley v.	99
Tillotson	425	Staple v. Spring	428
v. White	207		
Smiths, Campbell v.	250		

Staples v. Heydon	145	Sturges v. Bridgman	135, 141
State v. Alstead	490	Stuyvesant, Underwood v.	26
v. Atherton	182	v. Woodruff	125
v. Northumberland	343	Suffield v. Brown	118, 267
v. Pottmeyer	299	Suffolk Man. Co., Bowers v.	182
Scott v.	181	Sullivan R. R., Chapin v.	130
Shelby v.	490	Summers, Gerenger v.	303
v. Trask	182	Sumner, Crawshaw v.	228
Stearns, Cook v.	473	Sury v. Pigot	56, 448, 457
v. Mullen	321	Sutcliff, Wood v. 257, 258, 364, 368,	437
Steggles, Moody v.	78	Suteliffe v. Booth	48
Stein v. Burden 56, 297, 302, 366		Sutton v. Lord Montfort	163
Cherry v.	207	Swaine v. Great Northern	
v. Hauck	208, 220	R. R.	381
Lewis v.	436	Swansea Waterworks Co.	
Stephens, Bailey v.	112	Eaton v.	173
Sterrett, Hoy v.	207	Swartz v. Swartz	474
Stetson v. Curtis	337	Swartz, Swartz v.	474
v. Dow	96, 266, 336	Swazy v. Brooks	100
Stevens, Arnold v.	464, 489	Sweeney, Ray v.	208
Bailey v.	7, 15	Sweet v. Cutts	66, 241, 242
v. Dennett	3, 169	Swift, Hall v.	178, 456, 457
v. Stevens	367, 473	Swindon Waterworks Co. Limited,	
Stevens v.	367, 473	Wilts & Berks Canal Co. v.	16,
Webster v.	228, 229	56, 296, 358	
Stevenson v. Wallace	2, 34	Swope, Robinson v.	273
Stewart v. Hartman	272	Swvenborough v. Coventry	192
Stewartstown, Abbott v.	452, 487	Syracuse, Bastable v.	242
Stickney, Munroe v.	425		
Stiles v. Hooker	250, 307		
Stillman, Noyes v.	429		
v. White Rock Co.	173		
Stillwell, Horner v.	307		
Stocker, Ivimey v.	20, 88		
Stockport Waterworks Co. v.			
Potter	4, 53, 249, 254, 310, 436		
Stoddard, West Roxbury v.	299		
Stokes, Shrieve v.	45, 411		
Stokoe v. Singers	177, 373, 478,		
	489		
Storr, Benjamin v.	381		
Story v. Odin	192, 205, 407		
Stourbridge Canal Co. v. Earl			
of Dudley	226, 422		
Stowell v. Lincoln	301, 425		
Tobin v.	156		
Stowmarket Co., Lingwood v.	436		
Straight v. Burn	387, 394		
Stratton, Piggett v.	81		
Stricker, Mullen v.	197, 200, 208		
Strong v. Benedict	312		
Stroyan v. Knowles	38, 410, 485		
Stuber, Reimer v.	144, 165		
Sturdy, Tyler v.	77, 181		

Taylor v. Porter	271	Tippett, Rex v.	455
Rawstron v.	51, 55, 241	Tipping v. Eckersley	365
Rogers v.	26, 42, 185, 229, 410	St. Helen's Smelting Co. v.	31, 188, 371, 373, 379, 381
v. Shafto	223	Tisdale, Gardiner v.	181
v. Townsend	270	Tobey v. Taunton	266, 336
v. Welch	66	Tobin v. Stowell	156
v. Whitehead	17, 342, 343, 346, 444	Miles v.	384
Team, Bowen v.	2	Tolle v. Correth	297, 301
Tenant v. Goldwin	47, 198, 258	Tomlin v. Fuller	314
Tennant, Bankart v.	91, 471	Tomlinson, Brownlow v.	76
City of London Brewery Co. v.	288, 366, 370, 387, 401	Tourtellot v. Phelps	311
Tennison, Dickey v.	272	Tower, Tucker v.	131
Terry, Howe Scale Co. v.	429	Towler, Drewell v.	78
Thackrah, Clay v.	172, 174	Town v. Faulkner	307
Thackerah, Smith v.	355, 410, 411, 485	Hubbard v.	208
Thayer, Cowell v.	250, 303, 306, 307	Townend, Wilson v.	359, 395
v. Payne	122	Townsend v. McDonald	250
Theed v. Debenham	401	Taylor v.	270
Thomas v. Bertram	269	Tracy v. Atherton	136, 165, 173, 269, 465
v. Brackney	309	Trafford v. Rex	54, 59
Flight v.	29, 141, 143, 178, 189, 215	Trask v. Patterson	271
v. Marshfield	134	State v.	182
v. Poole	266	Tredwell, Beardmore v.	371, 375
v. Sorrell	4	Tregonning, Blewett v.	7, 113, 184
v. Thomas	456, 459, 476	Trimble, Belknap v.	249
Thomas v.	456, 459, 476	Trimmer, Lillywhite v.	437
Thompson, Chandler v.	33, 84, 203, 481	Trower, Chadwick v.	44
Curtice v.	307, 428	Troy, Estes v.	181
v. Miner	123	Trumbo, Nesbitt v.	271
Turner v.	195	Trumbull, Marshall v.	94
v. Uglow	346	Truscott v. Merchant Taylors' Co.	32, 211, 214
Whalley v.	98, 100, 131, 476	Trustees v. Hoboken	181
Thomson, McCready v.	207	Holdane v.	183
v. Waterlow	104	v. Lynch	99
Thornborough, Hide v.	42, 140, 229	Trustees, &c. v. Youmans	65, 248
Thoroughgood, Johnson v.	78	Trustees of M. E. Church, Browne v.	460
Thorpe v. Brumfitt	15, 73, 356, 445	Tucker v. Newman	360
Thurber v. Marten	301	v. Tower	131
Prov. Gas Co. v.	79, 131	Tudor, Fifty Associates v.	207
Thurston v. Hancock	34, 38, 411, 485	Tudor Ice Co. v. Cunningham	335
Tickle v. Brown	170	Tufts v. Charlestown	95, 266
Tilley, Holden v.	160	Woodman v.	425, 428
Tillotson v. Smith	425	Tukey, Wright v.	182
Wadsworth v.	301	Tulk v. Moxhay	81
Tindall, Hutto v.	490	Tunbridge Wells Imp. Com., Goldsmid v.	259, 308, 423, 432, 434
Tinicum Fishing Co. v. Carter	11	Tupper, Hill v.	9, 15, 21, 22
		Turner v. Spooner	33, 84, 291

Turner v. Thompson	195	Veghte v. Raritan, &c. Co.	465, 472
Turnley, Bamford v.	31, 375	Venables, Foxall v.	164
Tuttle, Goodale v.	65, 241, 248	Verley, Joliet v.	183
Twentyman, Bell v.	427	Vestry of Bermondsey v. Brown	263
Tyler v. Hammond	457, 488	Vestry of St. George, Hamil-	
v. Sturdy	77, 181	ton v.	285, 346
v. Wilkinson	62	Vestry of St. Mary, Newing-	
		ton, v. Jacobs	6, 73, 280
U.		Viall v. Carpenter	270, 452, 487
Uglow, Thompson v.	346	Vicary, Pheysey v.	131, 449, 488
Ulleswater Steam Nav. Co.,		Village of Delhi v. Youmans	253
Marshall v.	320	Vincent, Borden v.	136, 250
Underwood v. Burrows	78, 110	Commonwealth v.	299
v. Carney	99, 339	Vintners' Co., Solomon v.	231, 236
v. Stuyvesant	265	Virginia & Gold Hill Water	
Union Bank of London, Herz v.	217, 219, 398	Co., Cole Silver Mining Co. v.	248
Union House v. Rowell	79	Vliet v. Sherwood	250
Union Mills v. Ferris	301	Volentine, Norton v.	249
Union R. R., Whitney v.	82, 367	Vooght v. Winch	250
Union Sugar Refinery, Fox v.	266, 336, 339	Voorhees v. Burchard,	99, 121
Union Wharf, Mussey v.	450	Vose, Hart v.	250
United Kingdom Electric Tel.		Vt. Cen. R. R., Quimby v.	130
Co., Reg. v.	332	Richardson v.	34, 411
United Land Co. v. Great East-		W.	
ern R. R.	129, 276, 281, 314, 315, 338, 453, 455	Wadsworth v. Tillotson	301
United States v. Appleton	121, 193, 208	Waffle v. N. Y. Cent. R. R.	241
Updegraff, Overdeer v.	124	Waggoner v. Jermaine	428
Upham, Bemis v.	368	Wagner v. Hanna	11
Upton, Commonwealth v.	29, 373, 381	Jones v.	34, 222
Darwin v.	205	v. Long Island R. R.	241, 243
Utica & Minden Turnpike Co.,		Wait, McGregor v.	114
Hooker v.	131	Waite, Kent v.	99, 174, 184
V.		Wakefield, Bachelder v.	134
Valentine v. Boston	181	v. Duke of Buccleuch	36, 185, 224, 294
Dana v.	30, 366, 371, 382	Wakeley v. Davidson	311
Spensley v.	11	Waldron, Hayes v.	239
Van Alstyne, Adams v.	79	Walker, Adams v.	242
Van Bergen v. Van Bergen	366, 368	Bright v.	11, 114, 151, 154, 168, 169, 170, 173, 175, 176, 458
Van Bergen v.	366, 368	Durham & Sunderland	
Van Deusen, Comstock v.	314	R. R. v.	109
Van Hoesen v. Coventry	301	Gladfelter v.	309
Vawdrey, Seaman v.	462	Jennison v.	72, 276, 277, 312, 351, 464, 465, 489
Veazie v. Dwinel	239, 429	Lamb v.	419
		v. Pierce	444
		Walkins v. Peck	134
		Wallace v. Fletcher	136, 165
		Stevenson v.	2, 34

Wallis v. Harrison	471, 475	Weekly v. Wildman	8
Hawkins v.	78	Welch v. Wilcox	335
Walter v. Selfe	30, 371, 378, 380	Taylor v.	66
Walters, Harvey v.	78, 456	Weller v. Smeaton	382
Warburton v. Parke	174	Wells, Drake v.	474, 475
Ward, Berridge v.	320	v. Ody	80, 397
Lawton v.	324	Wemple, Crounse v.	134
v. Neal	208, 209	Wentworth, Dana v.	367
Noyes v.	183	Hancock v.	450
Race v.	7, 64, 160	Wernham, Pringle v.	397
v. Robins	147	West, Slackman v.	164
v. Ward	462, 489	West Roxbury v. Stoddard	299
Ward v.	462, 489	Westaway, Mitcalf v.	4, 284
v. Warren	166	Westbourne v. Mordant	427
Wardle v. Brocklehurst	104	Westbrook v. North	130
Ware, Cleveland v.	166	Western v. McDermott	81
Warford, Snyder v.	269	Weston v. Alden	301
Warner, Holback v.	145	Wetherell v. Brobst	90
v. McBryde	199	Wetmore, Palmer v.	197
Warren v. Blake	126, 457	Whaley v. Laing	4, 254, 440, 443
v. Bunnell	273	Whalley v. Thompson	98, 100, 131, 476
Hubbell v.	82, 367	Wharin, Brummell v.	83, 408
Ward v.	166	Wharton, Rex v.	429
Warrick v. Queen's College, Oxford	180	Wheatcroft, Mold v.	471
Warshauer v. Randall	464	Wheatley v. Bauch	65, 207, 253
Warwick, Harbidge v.	174, 176, 214, 215, 216	Wheeldon v. Barrows	199
Wasdale, Manning v.	7	v. Burroughs	127
Washburn, Miller v.	314, 339	v. Burrows	121
Washburn & Moen Man. Co. v. Worcester	438	Wheeler, Baker v.	474
Waterlow, Thomson v.	104	v. Gilsey	269
Waters v. Lilley	7, 186	Whetstone v. Bowser	248
Watkins, Mellor v.	469	Whitaker v. Cawthorne	473
Watson v. Bioren	339	Myer v.	299
Horner v.	34, 222	White v. Bass	192, 198, 199
Watts v. Kelson	27, 104, 118, 268, 314, 456	v. Bradley	195, 271
Waud, Wood v.	30, 51, 56, 67, 69, 167, 242, 247, 248, 254, 258, 262, 300, 302, 435, 440, 449	v. Chapin	135, 429
Waugh v. Leech	182	v. Clack	271
Way, Clark v.	89	v. Crawford	15, 464
Wead, Pernam v.	270, 271	Cincinnati v.	181
Weate, Beeston v.	243, 249	v. Flannigain	96, 266
Weathersfield, Paige v.	183	Prescott v.	239, 285, 429
Webb v. Bird	135, 138, 141, 162, 187, 369	v. Reeves	450
Moore v.	239	Smith v.	207
Plummer v.	475	White Rock Co., Stillman v.	173
v. Portland Man. Co.	366	Whitehead v. Parks	248, 275, 426
Webster v. Stevens	228, 229	Rhodes v.	297
Weekly, Abbott v.	19	Taylor v.	17, 342, 343, 346, 444
		Whitely, Barber v.	79
		Whiting, Melvin v.	7, 165
		Whitney v. Lee	339
		Mumford v.	89, 473
		v. Olney	121

Whitney v. Union R. R.	82, 367	Wilts & Berks Canal Nav. Co.	
Whitsell, Ferguson v.	477	v. Swindon Waterworks Co.	15,
Whittier v. Cocheco Man. Co.	303		56, 296, 358
Whittingham, Robson v.	397	Wimbledon & Putney Com-	
Whyte, Rolle v.	25	mons Conservators v. Dixon	316,
Wickersham v. Orr	474		317, 319, 347, 455
Wickham v. Hawker	7	Winch, Vooght v.	250
Wilas, Snowden v.	474	Windsor, Brown v.	236
Wilbur, Fiske v.	311	Winfield v. Henning	82, 367
Wilcox, Welch v.	335	Winnipiseogee Lake Co.,	
Wild v. Deig	272	Coe v.	366
Wilde v. Minsterley	46	v. Young	306
Wilder v. St. Paul	182, 263	Winnisimmet Co., Luther v.	243
Wildman, Weekly v.	8	Winship v. Hudspeth	160, 163, 168
Wiley, Emerson v.	465	Winslow v. Newell	99
Wilkes, Broadbent v.	185	Winter v. Brockwell	471
Espley v.	95, 265, 269	Winthrop v. Fairbanks	99
Wilkinson v. Proud	5	Wise, Osborn v.	319, 348
Tyler v.	62	Wissler v. Hershey	269
Williams v. Davies	177, 179	Witham v. Osburn	272
Dewey v.	311	Wolcott, Ashley v.	243
Elsing v.	166	Wolfe v. Frost	472
Heath v.	239, 429	Womersley v. Church	439
Heigate v.	457, 476	Wood, Doe d. Hanley v.	5, 470
v. James	275, 279, 317, 324,	Wood v. Edes	473
	326, 455	v. Hewett	78
Jeffries v.	415	v. Leadbitter	4, 90, 284, 361,
Jenks v.	81		469
v. Morland	252, 355, 357,	v. Saunders	98, 276, 278, 281
	358, 424, 429, 430	Shears v.	430
Morse v.	166	v. Sutcliff	257, 258, 364,
v. Nelson	250		368, 437
Nicklin v.	416, 417, 420	v. Waud	30, 51, 56, 67, 69,
Prescott v.	56, 239, 429		167, 242, 247, 248, 254,
v. Safford	343		258, 262, 300, 302, 435,
Wright v.	20, 69, 142, 145,		440, 449
	147, 251, 258	Woodbury v. Parshley	472
Willis, Carbrey v.	78, 124, 166, 251,	Woodgate, Mercer v.	314
	270	Woodman v. Tufts	425, 428
Wilson, Capers v.	351	Woodruff, Stuyvesant v.	127
Campbell v.	113, 160, 169	Woods, Paine v.	299
v. Chalfant	472	Woodward v. Seeley	472
Chatfield v.	65, 248, 253	Short v.	306
Cohen v.	366	Woodyer v. Hadden	182, 320
Dennis v.	99	Worcester, Dickinson v.	242
Dougal v.	205	Merrifield v.	438
Harding v.	95, 265	Washburn & Moen Man.	
Livett v.	114, 173	Co. v.	438
Rowbotham v.	26, 34, 44,	Worrall v. Rhoads	166
	95, 129, 224, 293, 294	Worster, Great Falls Co. v.	429
v. Saxon	181	Worthington v. Gimson	104, 117
v. Townend	359, 395	Wright v. Freeman	207, 465, 491
Young v.	123	v. Howard	24, 57, 249, 252,
Wilton R. R., Dunklee v.	123		275, 296, 355, 357, 424

Wright <i>v.</i> Moore	303, 429	Yates <i>v.</i> Jack,	287, 386, 404
<i>v.</i> Tukey	182	Youmans, Trustees, &c. <i>v.</i>	65, 248
<i>v.</i> Williams	20, 69, 142,	Village of Delhi <i>v.</i>	253
	145, 147, 251, 258	Young, Huson <i>v.</i>	331
Wrigley, Dewhirst <i>v.</i>	115	<i>v.</i> Wilson	123
Wyatt <i>v.</i> Harrison	34, 42, 410, 485	<i>v.</i> ———	343
Wyeth, Foley <i>v.</i>	34, 38, 413, 485	Winnipiseogee Lake	
Wynkoop <i>v.</i> Burger	276, 346	Co. <i>v.</i>	306
Wynstanley <i>v.</i> Lee	157, 160	———, Young <i>v.</i>	343
Y.		Z.	
Yale, Brace <i>v.</i>	249	Zehner, Hammond <i>v.</i>	135

A TREATISE
ON
THE LAW OF EASEMENTS.

A TREATISE

ON THE

LAW OF EASEMENTS.

CHAPTER I.

ON THE NATURE OF EASEMENTS.

SECT. 1. — *On the Nature of Easements generally.*

THE word "Easement" is in legal use frequently misapplied, for in addition to that particular class of rights to which it is properly applicable, it is often used to designate a variety of incorporeal rights, which, doubtless, in some respects resemble easements, but which are really wanting in many of those features which are characteristic of easements properly so called. It is, therefore, the purpose of this treatise, in the first place, to point out the nature and peculiar qualities of easements as they are explained in various decisions of the courts of law.

Misuse of
the word
Easement.

The earliest definition of the word "Easement" is to be found in an ancient but well-known book called *Termes de la Ley*, in which it is laid down that an "easement is a privilege that one neighbor hath of another, by writing or prescription without profit, as a way or sink through his land, or such like."^a To the trustworthy character of this book, Bayley, J., bears testimony, describing it, when quoting the above definition, as a book of great antiquity and accuracy;^b but it will be seen, on consideration, that the words of this definition are very wide in their signifi-

Definition
of Ease-
ment.

^a *Termes de la Ley*, p. 284.

^b *Hewlins v. Shippam*, 5 B. & C. at p. 229.

cation, and will embrace many rights which are not easements in the strict sense of the word, and to which that term ought not to be applied according to modern decisions. Before, however, proceeding to the consideration of those decisions, it may not be out of place to give a definition which, it is conceived, more accurately describes easements strictly so called, and reduces the meaning of the word to proper limits, as it is understood at the present day: An easement is a *privilege without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former.*¹

Of easements, according to this definition, there are two kinds, similar to one another in many respects, but differing materially in many important particulars. To the first class belong those easements which are created by the act of man, and to the second class those which are given by law, to every owner of land. The latter rights are given by law because, without them, no man would have security that his land would not at any moment be rendered useless by an act of a neighbor otherwise lawful, or because a neighbor might otherwise deprive a landowner of the benefits derivable from things which in the course of nature have been provided for the common good of mankind, and which the law therefore deems it wrong that one man should altogether appropriate for his own use to the detriment of another person. These easements are inherent in the land *ex jure naturæ*, of natural right, are secured to the landowner by the common law, and

¹ Cited with approbation in *Stevenson v. Wallace*, 27 Gratt. 87. An easement has sometimes been said to be "a right which one proprietor has to some profit, benefit, or beneficial use, out of, in, or over the estate of another." *Ritger v. Parker*, 8 Cush. 147. "A charge or burden upon one estate (the servient), for the benefit of another, the dominant." *Morrison v. Marquardt*, 24 Iowa, 35. "A liberty, privilege, or advantage which one may have in the lands of another without profit." *Big Mountain Improvement Co.'s Appeal*, 54 Penn. St. 361. "A privilege which one neighbor hath in the land of another, as appurtenant to his own land." *Mounsey v. Ismay*, 3 H. & C. 486. See *Bowen v. Team*, 6 Rich. 298.

are usually called "Natural Rights."^c It will be seen hereafter that the purpose of Natural Rights is to secure necessary support for land from the adjacent and subjacent soil, while it is allowed to remain in its natural condition, and the due enjoyment of air, light, and water, which, by the provision of nature, flow over the soil of one landowner to that of another for the common benefit of each. Though Natural Rights are a species of Easements, the expression "Easement" is commonly used exclusively to denote the first class of easements to which allusion has been made, — that is, easements created by the act of man, — and in that sense the word is used throughout this work; while the second class of easements — that is, those created by operation of law — are distinguished by the name of "Natural Rights." It is very essential that the difference in the origin and character of these two classes of easements should be borne in mind.

Returning to the definition of Easements in *Termes de la Ley*, cited above, it will be noticed that those rights are said to be privileges that one neighbor hath of ^{Licenses.} another *by writing* or prescription. At the present day^d this is not strictly true, for if an attempt be made to confer an easement by writing not under seal, all that the grantee will get will be a *license* to use the privilege, as he would if the privilege were granted by word of mouth; he will not get any vested right entitling him to continue its use and enjoyment against the will of the grantor. Thus it has been said: "A right of way or a right of passage for water (where it does not create an interest in the land) is an incorporeal right, and stands upon the same footing with other incorporeal rights — such as rights of common, rents, advowsons, &c. It lies not in livery, but in grant, and a freehold interest in it cannot be created or passed (even if a chattel interest may, which I think it cannot), *otherwise than by deed*."^e It is very impor-

^c Natural rights have sometimes been called "natural easements."

^d In olden times nothing was called a *writing* but a document under seal.

^e Per Bayley, J., in *Hewlins v. Shippam*, 5 B. & C. at p. 229; *Fentiman v. Smith*, 4 East, 107; *Cocker v. Cowper*, 1 C., M. & R. 418. See *Fuhr v. Dean*, 26 Mo. 116; *Stevens v. Dennett*, 51 N. H. 331.

tant to mark this distinction, for if it is professed to grant an easement by an instrument which passes only a license to the grantee, his position is materially different from what it was intended to be, and he may find his interest suddenly terminated by the act of his grantor when he least expects it.¹ A grant by deed will pass an indefeasible right to an easement, not only against strangers, but against the grantor and his assigns; whereas "a dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful."² Though the interest of a mere licensee is therefore of so limited a character as against his grantor, it will be seen hereafter that his right to enjoy his privilege is not absolutely at the mercy of strangers, for he has generally power to sue, either in his own name or in the name of his grantor, any stranger who is a wrong-doer who hinders him in the enjoyment of his privilege.³

This difference existing between Easements, Natural Rights, and Licenses, it is proposed next to consider the several parts of the definition of an easement above given, and finally to conclude the section with some remarks of a general character relative to the nature of easements.

In the first place an easement is a *Privilege*. The word "privilege," it will be observed, is that used in the old definition in *Termes de la Ley*, and it is retained, as it expresses very accurately the nature of an easement in this respect. An easement is not a right to land nor to any corporeal interest in land, and thus a grant of a right of way does not convey the soil over which the way passes to the grantee,² and from this it follows as a natural consequence,

An easement is a *Privilege*.

¹ See *Morse v. Copeland*, 2 Gray, 302; *Ruggles v. Lesure*, 24 Pick. 187; *Foster v. Browning*, 4 R. I. 47; *Dyer v. Sandford*, 9 Met. 395.

² Per Vaughan, C. J., in *Thomas v. Sorrell*, Vaughan, 351; *Wood v. Leadbitter*, 13 M. & W. 838; 14 L. J. Exch. 161.

³ *Whaley v. Laing*, 2 H. & N. 476; 26 L. J. Exch. 327; in Exch. Cham. 3 H & N. 675; 27 L. J. Exch. 422. Per Bramwell, B., in *Stockport Waterworks Company v. Potter*, 3 H. & C. 300; *Mitcalf v. Westaway*, 34 L. J. C. P. 113.

² *Jamaica Pond Aqueduct Co. v. Chandler*, 9 Allen, 159.

that the grantee cannot prevent another person, even a trespasser, from using the land, if such usage does not impede him in the exercise of his right of passage.^h In the case of *Clifford v. Hoare*,ⁱ Brett, J., marked this distinction between an easement and a corporeal interest in land, when he said: "The road is not his, the exclusive use of it is not granted to him; what was granted to him was an easement and nothing more. The soil has not been conveyed to him, but he has the right to use a road forty feet wide. If the soil of the road had been granted to the plaintiff, any interference with it would have been actionable; but where an easement over a road is granted, only the reasonable enjoyment of the road passes; this seems to be the result of the authorities as to the difference between the right to the soil and an easement over it." It has been held that a right to take coal from under the land of another person is an incorporeal right or a privilege; but a right to *all* the coal lying under a particular close is a corporeal right and not a privilege, because it is a right to part of the soil.^j A grant of the *exclusive use* of land does not confer merely a privilege of using the land, but as it excludes the owner of the soil from all benefit it is a grant of the soil itself, and such a right is therefore not an easement,^k and it was said by the lord chancellor in the case of *Dyce v. Lady James Hay*,^l that "neither by the law of Scotland nor of England can there be a prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected."

The same principle applies in the case of public ways, which,

^h *Rex v. Jolliffe*, 2 T. R. 90. And see *Cook Co. v. Chicago, &c. Railroad Co.* 35 Ill. 464.

ⁱ L. R. 9 C. P. 362; 43 L. J. C. P. 225. See *Read v. Leeds*, 19 Conn. 183.

^j *Wilkinson v. Proud*, 11 M. & W. 33; 12 L. J. Exch. 227; *Sanders v. Norwood*, Cro. Eliz. 683; *Doe d. Hanley v. Wood*, 2 B. & Ald. 724.

^k *Buszard v. Capel*, 8 B. & C. 141; 6 L. J. K. B. 267; in Exch. Cham. 6 Bing. 150; 3 Y. & J. 344; *Roads v. Parish of Trumpington*, L. R. 6 Q. B. 56; 40 L. J. M. C. 35. See *Caldwell v. Fulton*, 31 Penn. St. 475.

^l 1 Macq. 305; *Hext v. Gill*, L. R. 7 Ch. App. 699; 41 L. J. Ch. 761.

it will be shown presently, are not easements, though in many of their incidents they are analogous. The respondent, in a case stated by a metropolitan magistrate, was owner of some premises adjoining a public highway, which he used for depositing machinery of a heavy character. In conveying the machinery to his yard, across the paved footway, which ran in front of his gate, the respondent broke the flag-stones, and was summoned before the magistrate, under the Highway Act, for a nuisance; and it became a question whether he had a right to take his machinery into the yard in that manner, or whether, by the dedication of the way to the public for a footway, he had been so deprived of his right to the use of the soil that it could not be used for the purpose of conveying the machinery over it to the yard. It was decided that his right to the use of the soil of the footway for the machinery was not lost. The Court of Queen's Bench said: "The right of the respondent depends upon the nature and extent of the rights acquired by the public over the footway in question either at common law or under the Highway Acts or the Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 98. The owner who dedicates to the public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith,¹ and the appropriation made to and adopted by the public of a part of the street to one kind of passage, and another part to another, does not deprive him of any rights as owner of the land, not inconsistent with the right of passage by the public."^m

An easement is a privilege *without profit*. A right by which one person is entitled to remove and appropriate for his own use *any part of the soil* belonging to another man, or anything growing in or attached to or subsisting upon his land, for the purpose of the profit to be gained from the property thereby acquired in the thing re-

¹ See *Robbins v. Borman*, 1 Pick. 122; *Adams v. Emerson*, 6 Pick. 57.

^m *Vestry of St. Mary, Newington, v. Jacobs*, L. R. 7 Q. B. 47; 41 L. J. M. C. 72. See *Hildreth v. Lowell*, 11 Gray, 345; *Codman v. Evans*, 5 Allen, 308.

moved, has always been considered in law a different species of right from an easement, and is commonly called a *profit à prendre*. Thus, it was said in an old case: "The word 'easement' is known in law, but here the thing itself is set forth, viz., to catch fish, &c., and certainly no instance can be given of a prescription for such a liberty by such a word or name."ⁿ So it has been held that a right to take stones from the land of another person to mend roads is a *profit à prendre* and not an easement;^o as also is the right to turn cattle into a lane for the purpose of obtaining pasture;^p and a right to enter land and to cut and carry away trees there growing.^q So of a right to take seaweed from the land or beach of another;¹ or to fish in an unnavigable stream on another's land;² or to hunt on his land;³ or to carry away drifting sand from his beach.⁴ It has been decided, however, that a right to enter land and to draw and take away *water* is an easement and not a *profit à prendre*, the reason being that water is not a part or the produce of the soil, nor the property of the owner of the land over which it flows, or on which it is standing, unless it is confined in a tank or other vessel.^r

An easement is, in the next place, defined to be a right which the owner of *one tenement* has a right to enjoy *in respect of that tenement* in or over *the tenement of another person*. Here, it will be observed, two tenements are mentioned — one is that of which the owner is entitled to the easement, the other is that in or over

No easements in gross.

ⁿ Peers v. Lucy, 4 Mod. 355; Cobb v. Davenport, 4 Vroom, 223.

^o Constable v. Nicholson, 14 C. B. N. S. 230; 32 L. J. C. P. 240.

^p Bailey v. Appleyard, 8 A. & E. 161.

^q Bailey v. Stevens, 12 C. B. N. S. 91; 31 L. J. C. P. 226.

¹ Hill v. Lord, 48 Me. 84. See Huff v. McCauley, 53 Penn. St. 209.

² Waters v. Lilly, 4 Pick. 148; Bland v. Lipscombe, 30 E. L. & Eq. 189; 4 E. & B. 714. See Melvin v. Whiting, 7 Pick. 80; 13 Pick. 184; McFarlin v. Essex Co. 10 Cush. 304.

³ Pickering v. Noyes, 4 B. & C. 639; Wickham v. Hawker, 7 M. & W. 63.

⁴ Blewett v. Tregonning, 3 A. & E. 554.

^r Race v. Ward, 4 E. & B. 702; 24 L. J. Q. B. 153; Manning v. Wasdale, 5 A. & E. 758; 6 L. J. N. S. K. B. 59. And see Hill v. Lord, 48 Me. 99.

which the easement is to be enjoyed, and it will be further remarked that the easement is to be enjoyed *in respect of* the first-named tenement. If an easement were a right to which a person could be entitled irrespectively of any land of which he is possessed, such a right would be called an easement *in gross*, and a contention has been raised as to whether the law will not recognize such a right; the word "easement" may indeed, in many instances, be found to have been applied to rights of that description — as, for instance, in the case of *Dovaston v. Payne*,^s where Heath, J., is reported to have said, when speaking of a public highway, the right to the use of which belonging to the public could not have been had in respect of any tenement, — "the property is in the owner of the soil, subject to *an easement* for the benefit of the public." It will be noticed, moreover, that in the old definition of an easement in *Termes de la Ley*, there is nothing said about a tenement in respect of which a right to be an easement must be enjoyed; but this, according to modern decisions, is another of the defects in that definition, for it is clearly established now that there is no such right known to the law as an easement *in gross*. True it is that there may be rights analogous in many respects to easements unattached to any tenement, but they are not easements, and lack many of the peculiar characteristics of those rights; for instance, a right of way in gross is a personal right only, and cannot be assigned by the grantee to another person,^t whereas an easement of way is appurtenant to the grantee's land, and will pass with that land to an assignee, if proper words of conveyance be used.

Several authorities may be cited in support of the proposition that a right in gross is not an easement — as, for instance, *Rangeley v. The Midland Railway Company*,^u which

^s 2 Sm. L. C. 132, 6th ed.; 2 H. Bl. 527. In *Brumfitt v. Roberts* (L. R. 5 C. P. 224; 39 L. J. C. P. 95), a right to a pew in church is designated an easement; and in *Barlow v. Rhodes* (1 C. & M. at p. 448), Bayley, B., applied the same word to a right of common.

^t *Ackroyd v. Smith*, 10 C. B. 164; 19 L. J. C. P. 315; *Weekly v. Wildman*, per Triby, C. J., 1 Ld. Raym. 405.

^u L. R. 3 Ch. App. 306; 37 L. J. Ch. 313.

was a case arising out of the diversion of a public footway by the railway company. Lord Cairns, L. J., in the course of his judgment, expressed his opinion on this point in most distinct terms, for he said: "Now it is said that it" (that is, the land over which the new footway was to be made) "is not to be permanently used, and that the only object of the company is to create an easement over it, and that the land will remain the freehold and property of the original owner subject to that easement. I will assume, in the first place, that that is a correct expression, and that the object is to create what is properly termed an easement over the land. . . . But I must also observe that it appears to me to be an incorrect expression to speak of this as an easement. There can be no easement properly so called unless there be both a servient and a dominant tenement. There is, in this case, no dominant tenement whatever. It is true that, in the well-known case of *Dovaston v. Payne*, Mr. Justice Heath is reported to have said, with regard to a public highway, that the freehold continued in the owner of the adjoining land, subject to an easement in favor of the public; and that expression has occasionally been repeated since that time. That, however, is hardly an accurate expression. There can be no such thing, according to our law, or according to the civil law, as what I may term an easement in gross. An easement must be connected with a dominant tenement. In truth, a public road or highway is not an easement; it is a dedication to the public of the occupation of the service of the land for the purpose of passing and repassing, the public generally taking upon themselves (through the parochial authorities or otherwise) the obligation of repairing it. It is quite clear that that is a very different thing from an ordinary easement where the occupation remains in the owner of the servient tenement, subject to the easement." So again, Martin, B., in *Hill v. Tupper*,^v said: "An easement is a right ancillary to the enjoyment of land," and there are other decisions to the same effect."^w

^v 2 H. & C. 121; 32 L. J. Exch. at p. 217.

^w See also *Shuttleworth v. Le Fleming*, 19 C. B. N. S. 687; 34 L. J. C. P. 309; *Mounsey v. Ismay*, 3 H. & C. 486; 34 L. J. Exch. 52.

In America the right or privilege of the community in public highways has generally been *called* an easement, though perhaps not strictly such. If an easement, it is an easement in gross, since it is personal and not appurtenant to any estate owned by the individuals claiming it; but it is something more than an easement, partaking of the nature of a *profit à prendre*; since the public authorities have a right to take and carry away from the soil any earth, rock, gravel, trees, or other things necessary for the repair of the road, not only at the place where found, but on any other portion of the same road, or even elsewhere within the jurisdiction of the same municipal authorities.¹ Accordingly such rights are not elaborately discussed in this treatise.

An easement cannot be severed from the land to which it is annexed and made a right in gross.²

In America this doctrine of *Ackroyd v. Smith* has not been universally approved, and here it has frequently been held that an easement may be severed from the land with which it is originally connected or used; and if the terms of the grant do not forbid, may be made a right in gross, and assignable, or descendible to the heirs of the original grantee, quite disconnected from any particular estate. Thus when P. conveyed to B. a tract of land with a spring on it, reserving to himself, his heirs and assigns, the right of taking water therefrom forever through a pipe, and a right to enter and repair the pipe, when necessary, upon payment of damages therefor, but without any limitation as to the time or place when such right should be enjoyed, it was held that such right was assignable by P. to G., although G. had no interest in the land of P. to which the right was annexed, but used it in connection with other land obtained from other parties.² And in *The Lonsdale Co. v.*

¹ *Denniston v. Clark*, 125 Mass. 216; *Hovey v. Mayo*, 43 Me. 322; *New Haven v. Sargent*, 38 Conn. 50.

² *Ackroyd v. Smith*, 10 C. B. 164; 19 L. J. C. P. 315.

² *Goodrich v. Burbank*, 12 Allen, 459, in which Foster, J., examines and denies the doctrine of *Ackroyd v. Smith*. And this was again approved in the same court in *Goodrich v. Burbank*, 97 Mass. 27; *French v. Morris*, 101 Mass. 68; *Owen v. Field*, 102 Mass. 108; *Amidon v. Harris*,

Moies,¹ before the Circuit Court of the United States, Judge Curtis said: "I know no rule of the common law which prohibits grants of the incorporeal right to divert water from being made in gross. If I have a spring, I may sell the right to take water from it by pipes, to one who does not own the land across which the pipes are to be carried, and I may restrict the use to a particular house or not as I please."

DOMINANT AND SERVIENT TENEMENTS AND OWNERS.

It may here be mentioned that the tenement in respect of which an easement is enjoyed is called the "Dominant Tenement," and the owner of that tenement is called the "Dominant Owner," while the tenement in or over which the right is exercised is called the "Servient Tenement," and the owner thereof is called the "Servient Owner."

As it is essential to the existence of an easement that there shall be two tenements, — a dominant tenement to which the right is appurtenant, and a servient tenement in or over which that right is enjoyed,² — so it is also essential that those tenements shall be *distinct* properties; that is, that they shall belong to different persons. This is a point which scarcely needs demonstration, for it is obvious that if two tenements belong to one individual, he has a right, as owner, to use each in whatsoever manner he finds most convenient to himself, and he may make the one tenement servient to the other simply because it is his own; in whatever manner, therefore, he exercises his right, he exercises it in his capacity of owner of the soil, and the right he exercises is not an easement, but a proprietary right incident to the ownership of the land.³ In *Bright v. Walker*,^v Parke, B., in speaking of the causes which would prevent an easement being acquired by prescription, says: "For the same

Dominant and servient tenements *distinct*.

113 Mass. 59. See *Wagner v. Hanna*, 38 Cal. 111; *Spensley v. Valentine*, 34 Wis. 154; *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 38.

¹ 21 Law Rep. 664 (1857). See *Bissell v. Grant*, 35 Conn. 288.

² *Dark v. Johnston*, 55 Penn. St. 164; *Mabie v. Matteson*, 17 Wis. 1; *Scott v. Beutel*, 23 Gratt. 1.

³ *Oliver v. Hook*, 47 Md. 301.

^v 1 C., M. & R. at p. 219.

reason it would not" (that is, title would not be acquired) "if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed as of right the easement, but the soil itself." "We all agree," said Tindal, C. J., in delivering judgment in the Exchequer Chamber, "that where there is a unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way."^z So, again, where the defendant claimed a right to pollute a stream to the detriment of a mill-owner by reason of having been accustomed for twenty years to throw cinders into the water, Coleridge, J., when delivering the judgment of the court, said: "Or, secondly, the defendant might claim the banks and bed of the Hebble, on and in which the cinders and scoriæ have been deposited, as in his own occupation, in which case the right to deposit them there could be no easement."^a And, again, in the case of a claim of right to light, it was decided that while the dominant and servient tenements were in the occupation of the same person, no easement or right to unobstructed light could be acquired by prescription; and Lord Hatherley, C., said: "I take the principle of that case" (that is, a case he had been mentioning), "in spite of one expression as to the possibility of interruption, to be, that in order to obtain an easement over land you must not be the possessor of it, for you cannot have the land itself and also an easement over it."^b

It is on this principle that a tenant cannot acquire an easement by prescription in land belonging to his landlord, for the possession and user by the tenant is the possession and user of his landlord, and the landlord could not acquire an easement in his own soil.^c A question, however, might arise,

^z *James v. Plant*, 4 A. & E. at p. 761; 6 L. J. N. S. Exch. 260.

^a *Murgatroyd v. Robinson*, 7 E. & B. at p. 397; 26 L. J. Q. B. at p. 238.

^b *Ladyman v. Grave*, L. R. 6 Ch. App. at p. 767.

^c *Gayford v. Moffatt*, L. R. 4 Ch. App. 133; *Russell v. Harford*, L. R. 2 Eq. 507.

whether a tenant could not acquire an easement by prescription under the Prescription Act^d in land of his lessor, not against him, but against another tenant to whom the *quasi-servient* tenement happened to be leased, such easement being coextensive with the period of years during which the tenements were jointly leased. Such a question could not arise under the common law, for a tenant can, at common law, prescribe in right of his landlord, the owner of the fee, only;^e but under the Prescription Act claims to easement by prescription may be made and sustained in right of the *occupier* of the land.^f If such an easement can be acquired it is clear it could only be in cases of long leaseholds, which, however, are very common at the present day. The possibility of one tenant acquiring an easement against another tenant holding under the same landlord seems to have presented itself to the mind of Sir R. T. Kindersley, V. C., when delivering judgment in the case of *Daniel v. Anderson*,^g for he, after laying down that a tenant could not acquire an easement against his landlord by long user, said: “And *whatever may be the rights of one tenant against another*, the owner remains where he was, and therefore you cannot talk of any easement acquired by him or vesting at all, *for whatever rights one tenant may have against another, it is only as between them as tenants.*” Further than this, a case of the kind actually occurred. The point, however, was not decided as to easements generally, but was limited to cases of rights to unobstructed light;^h for the decision turned upon the words of the third section of the Prescription Act, under which the easement of unobstructed light is alone acquired. The words of that section, it will be shown hereafter, differ from those of the other sections of the act, and this difference has a very material effect on the mode of acquisition of the various kinds of easements under the respective sections. In the case alluded to, both the dominant and servient tenements were in the occupation of tenants under long leases, both leases being dated the same

^d 2 & 3 Wm. IV. c. 71.

^e *Large v. Pitt*, Peake's Ad. Ca. 152.

^f Sections 2 and 5.

^g 31 L. J. Ch. 610.

day, and granted by the same landlord, and after a time sufficient to enable a person to acquire a right to light, one tenant erected a greenhouse which obstructed the other tenant's light, upon which the latter commenced an action. It was contended for the defendant that one tenant could not acquire an easement against the other; but it was held that in the case before the court he could and had done so, but it was on account of the peculiar wording of the third section of the Prescription Act.^h It is remarkable in this case, however, that the court seemed to think that such an easement acquired by one tenant against the other would survive to the reversioner after the expiration of the leases, supposing the freeholds had by that time passed to different owners, so that the easement might be acquired when there was unity of ownership in the freeholds, not only for the tenant, but for the future freeholder of the dominant tenement, if a severance should occur before the leases expired. But all this, it must be remembered, depends upon the peculiar wording of the section of the statute relating to light, and could not happen in the case of other easements. The court itself said at the end of the judgment that it might be that, following out the rule into every possible case, some apparent difficulties might at times be suggested; but as it is thought that this point could only occur under the third section of the act, these difficulties, it is also thought, could not be suggested.

Although no easement can be acquired by prescription by a tenant against his landlord, the landlord can confer any right he pleases upon his tenant by grant, and in case of an easement of necessity a grant will be implied.ⁱ

As it is essential to the existence of an easement that there shall be a dominant tenement in respect of which the right may be possessed, so it is also essential that the easement shall be beneficial to the occupation of the dominant tenement. The leading case in which this principle has been recognized and followed is, per-

Easements
beneficial
to dom-
inant tenement.

^h *Frewen v. Philipps*, 11 C. B. N. S. 449; 30 L. J. C. P. 356.

ⁱ *Gayford v. Moffatt*, L. R. 4 Ch. Ap. 133.

haps, *Ackroyd v. Smith*,^j in which Coleridge, J., after citing the judgment of Lord Brougham in *Keppell v. Bailey*,^k said: "It would be a novel incident attached to land that the owner and occupier should, for purposes wholly unconnected with that land, and merely because he is owner and occupier, have a right of road over other land; and it seems to us that a grant of such a privilege or easement can no more be annexed so as to pass with the land than a covenant for any collateral matter." This principle was also approved in the cases of *Hill v. Tupper*,^l and *Ellis v. The Mayor and Corporation of Bridgnorth*.^m The case of *Bailey v. Stevens*,ⁿ relating to a *profit à prendre*, is also in point. In that case a right was set up that the owners of a field had from time whereof the memory of man runneth not to the contrary, enjoyed the right at their free will and pleasure to enter a close of the plaintiff to cut and carry away and convert to their own use the trees and wood growing and being in the said close. There was no allegation that the wood, when cut, was to be used on or for the benefit of the field in respect of which the right was claimed, and it was held that such a right, though it might have been granted as a right in gross, would not pass with the occupation of the field as appurtenant. Willes, J., in his judgment, said: "But, assuming that such grants may be made, and are capable of being assigned, I apprehend it is clear that they can only be made in gross, and can only be assigned by the grantees by the ordinary conveyances known to the law; and it is not because the grantee may happen to be the owner of a close at the time the grant is made to him that such a conveyance can be dispensed with in favor of the persons who, from time to time, may succeed him in the ownership of that close;" and, after referring to

^j 10 C. B. 164; 19 L. J. C. P. 315. This case, *Ackroyd v. Smith*, was explained by the lords justices in *Thorpe v. Brumfitt*, L. R. 8 Ch. App. 650, and it was said by James, L. J., to have been misapprehended.

^k 2 Myl. & K. at p. 535. But see *White v. Crawford*, 10 Mass. 188.

^l 2 H. & C. 121; 32 L. J. Exch. 217. See *Borst v. Empie*, 1 Seld. 40.

^m 2 J. & H. 67; 32 L. J. C. P. 273. See *Perley v. Langley*, 7 N. H. 233.

ⁿ 12 C. B. N. S. 91; 31 L. J. C. P. 226. See *Post v. Pearsall*, 22 Wend.

a class of cases not in point, the learned judge continued: "In all other cases the incident sought to be annexed, so that the assignee of the land may take advantage of it, must be beneficial to the land in respect of the ownership of it." Byles, J., also said: "How can such a right as this be claimed by the occupier of land as such? It is in no way connected with the enjoyment of the land occupied. A man might as well try to make a right of way over land in Kent appurtenant to an estate in Northumberland." So also a waterworks company is not entitled to use the water of a stream to supply a town at a distance with water, merely because it happens to own land on the banks of the stream which would give it a right to use it for the purposes of that land.^o

It has thus been shown to be the law that there must not only be a dominant and a servient tenement to support an easement, but that the easement must be beneficial to the dominant tenement. Beyond this, it has been decided that no reciprocal easement can be acquired for the benefit of the servient tenement by the user, or exercise of the easement by the dominant owner; or, as Cockburn, C. J., expressed it in his judgment in *Mason v. The Shrewsbury and Hereford Railway Company*,^p the easement exists for the benefit of the dominant owner alone, and the servient owner acquires no right to insist on its continuance or to ask for damages on its abandonment. In that case the water of a stream had been diverted by a canal company for forty years, and on the purchase of the canal by the defendants under an act of parliament, the water was restored to its former course. Owing to the lapse of time the old bed of the stream had become partially silted up, so that it could not as of old carry off all the water in times of flood, and the land of the plaintiff, which was situated on the banks of the stream, was overflowed. It is manifest that it must often happen, as in that case, that the exercise of the easement by the dominant owner, operates also in favor of the servient owner.

^o *Swindon Waterworks Co. Limited v. Wilts and Berks Canal Co.* 45 L. J. Ch. 638; L. R. 9 Ch. 451; S. C. L. R. 7 H. L. 697.

^p L. R. 6 Q. B. 578; 40 L. J. Q. B. 293.

And the question in such cases must arise, as it did there, whether the servient owner can by the long user acquire any right against the dominant owner, to insist on the continuance of the exercise of the easement. It was decided by the lord chief justice, the other judges basing their judgments on different grounds, that he cannot.

The last clause in the definition of an easement above given, points out that the effect of an easement is the imposition of an obligation on the servient owner *to suffer or refrain from doing* something on his own tenement for the advantage of the dominant owner.

Obligation
on servient
owner to
suffer or re-
frain from
doing
something.

An easement is a right which is appurtenant to the dominant tenement and imposed upon the servient tenement; and it is important to mark that it is not imposed upon the person of the servient owner; therefore an obligation imposed upon *him* to do something for the benefit of the dominant tenement is not an easement; or, in other words, there can be no easement rendering it compulsory for the servient owner to do something. If the ordinary easements of light, support, way, or watercourse are considered, it will be seen that the obligation is, in every case, of a *passive* character as regards the servient owner: a right to uninterrupted light is a right that the servient owner shall *refrain* from building in such a manner as to obstruct the light; a right to support is a right that the servient owner shall *refrain* from moving means of support if the enjoyment of the dominant tenement would be thereby interrupted; a right of way is a right that the servient owner shall *suffer* the dominant owner to pass over his land; and a right of watercourse is a right that the servient owner shall *suffer* water to flow uninterruptedly over the servient tenement. For this reason it was laid down in *Pomfret v. Ricroft*,^a that the grantor of a right of way is not bound to repair the way, but the grantee of an easement has a right to repair the subject of the easement and to enter on the land of the grantor for that purpose whenever repairs may be required,

^a 1 Wms. Saund. at p. 322 a; *Taylor v. Whitehead*, Doug. 716; *Chauntler v. Robinson*, 4 Exch. 163; 19 L. J. Exch. 170; *Duncan v. Louch*, 6 Q. B., per Coleridge, J., at p. 909.

“for when the use of a thing is granted everything is granted by which the grantee may have and enjoy such use.” It is, therefore, clear that the only obligation cast by law upon a servient owner is, that he shall not do anything inconsistent with the right of the dominant owner.

CUSTOMS.

The definition of Easements having thus been fully considered, a few points relating to their nature still remain to be noticed; and, first, the difference between easements and customs claims attention, for the distinction appears not always clearly to be understood. From what has already been said, it will be seen that an easement is a right belonging to *an individual* in respect of his land; but a custom is a usage attached to a *locality*, and a customary right belongs to no individual in particular, but may be enjoyed by any who inhabit the locality for the time being, or who belonged to the particular class entitled to the benefit of the custom. It will suffice to refer to the case of *Mounsey v. Ismay*^r to exemplify this distinction. The action was brought for a trespass, and the defence was a supposed right claimed under the second section of the Prescription Act.^s The plea alleged that for the full period of twenty years next before suit, on Ascension Day, horse-races had been, and of right ought to have been, and still ought to be holden on the land where the trespass was alleged to have been committed, which was near the city of Carlisle; and for the full period of twenty years next before suit the freemen of the city of Carlisle on the day aforesaid in every year had without interruption enjoyed and claimed to enjoy as a custom a right to enter on the land for the purpose of holding horse-races, justifying the alleged trespass by stating that the defendant was one of the freemen of Carlisle, and entered the *locus in quo* in exercise of the right. There were twelve pleas claiming the right under the same section of the act in different ways, and in some substituting forty for twenty years. Martin, B., delivered the judgment of the court, and after

^r 3 H. & C. 486; 34 L. J. Exch. 52.

^s 2 & 3 Wm. IV. c. 71.

stating the effect of the pleas, and explaining the origin and provisions of the Prescription Act, continued: "The question which has been argued before us, and which is the true one, is whether a custom for the freemen or citizens of Carlisle upon Ascension Day to enter upon another man's land for the purpose of holding horse-races there, is an easement within the second section. To be so it must be within the words custom, prescription, or grant to a way or other easement, or to a water-course, or to the use of any water to be enjoyed upon land of another; and we think it is not. In the first place, we do not think that this custom is an easement at all. One of the earliest definitions of an easement with which we are acquainted is in the *Termes de la Ley*, and it is 'a privilege that one neighbor hath of another, by writing or prescription, without profit, as a way or sink through his land.' In this definition custom is not mentioned, prescription is, and it therefore seems to point to a privilege belonging to an individual, not a custom which appertains to many as a class." In Blackstone's Commentaries the distinction is also marked, for it is there said that, "If there be a usage in the parish of Dale that all the inhabitants of that parish may dance on a certain close at all times for their recreation (which is held to be a lawful usage'), this is strictly a custom, for it is applied to the *place* in general, and not to any particular *persons*; but if the tenant who is seised of the manor of Dale in fee alleges that he and his ancestors, or all whose estate he has in the said manor, have used time out of mind to have common of pasture in such a close, this is properly called a prescription, for this is a usage annexed to the *person* of the owner of this estate."

Although it is laid down thus broadly that a custom and an easement are totally different rights, there undoubtedly can be a custom in a locality under and by virtue of which an individual may become entitled to an easement in respect of his estate situated in the locality to which the custom belongs. Several instances of such customary easements are mentioned in the Reports as existing in the county of Cornwall in re-

* *Abbott v. Weekly*, 1 Lev. 176; *Millechamp v. Johnson*, Willes, 205, n.; *Hall v. Nottingham*, 1 Exch. D. 1; 45 L. J. Exch. 50.

spect of the tin mines ; as, for instance, in the case of *Carlyon v. Lovering*,^u where a customary right is alleged in the eighth plea, that tinners and miners within the Stannaries of Cornwall, lawfully working and mining tin and tin ore from any tin mine or tin work within the said Stannaries, situated upon or near to a stream of water running or flowing by or through such tin mine or tin work, should have and enjoy the right of washing away in, with, and by means of, such stream of water, where the same flowed by or through such tin mine, or tin work, all or any part of the sand, stones, rubble, and other stuff which should become or be dislodged or severed in the course of so working the said tin mine and tin ore, and of casting and throwing from and out of the said tin mine or tin work all or any part of the same sand, stones, rubble, and other stuff into the stream where the same flowed by or through the tin mine or tin work, and of having the same washed and carried away from the tin mine or tin work by the flow or the stream down the course of the stream to the sea ; and there can be no doubt but that this right, although claimed under a custom, is truly an easement,^v and the plea was held to disclose a lawful and valid custom. In the case of *Gaved v. Martyn*,^w also, a custom was alleged to exist in Cornwall, that tin-streamers have the free use of the water over the whole of the district within their tin-bounds, and they claim the right not only to use the water, but to divert it into other streams. This custom was much discussed in the case of *Ivimey v. Stocker* ;^x but in that case Lord Cranworth, C., is reported to have thought that the right to divert streams to mines must after long use be presumed to have been granted, and granted not to the tin-bounders, but to the owner of the soil under which the mines are situated, so that he appears to reduce the right of diversion to an easement acquired by the landowner by prescription, and to ignore the customary right of the tin-bounders. Possibly the decision might have

^u 1 H. & N. 784 ; 26 L. J. Exch. 251.

^v See *Wright v. Williams*, 1 M. & W. 77 ; 5 L. J. N. S. Exch. 107.

^w 34 L. J. C. P. at p. 354 ; 19 C. B. N. S. 732.

^x L. R. 1 Ch. App. 396 ; 35 L. J. Ch. 467.

been different if the diversion had been quite recent, for in that event no question of prescriptive title could have been raised.

Besides these and other cases in which easements claimed under and by virtue of customs are mentioned, this method of acquisition is distinctly recognized in the second section of the Prescription Act, which says: "And be it further enacted, that no claim which may be lawfully made at the common law *by custom*, prescription, or grant, to any way or other easement," &c. ; and the result, therefore, is, that although a custom is not itself an easement, and although the customary right of each individual of the class entitled to the benefit of the custom is not an easement, yet that, if a custom exists under which individuals of a class may obtain independent rights in respect of their land, which would be easements if acquired by grant or prescription, those rights are nevertheless easements though acquired under the custom.

It must be remarked that the law will not recognize any new species of easements, for "a new species of incorporeal hereditament cannot be created at the will and pleasure of an individual owner of an estate: he must be contented to take the sort of estate and the right to dispose of it as he finds the law settled by decisions or controlled by act of parliament."^v

No new
species of
easements.

This rule of law appears to have been first laid down by Lord Brougham, C., in the case of *Keppel v. Bailey*,^z in which he said: "There are certain known incidents to property and its enjoyment; among others certain burdens wherewith it may be affected, or rights which may be created and enjoyed over it by parties other than the owner; all which incidents are recognized by the law. . . . So in respect of enjoyment, one may have the possession and the fee simple, and another may have a rent issuing out of it, or the tithes of its produce, or an easement, as a right of way upon it or of common over it. And such last incorporeal hereditament may be annexed

^v Per Pollock, C. B., in judgment in *Hill v. Tupper*, 2 H. & C. 121; 32 L. J. Exch. 217. See note (u), *post*, p. 74.

^z 2 Myl. & K. at p. 535.

to an estate which is wholly unconnected with the estate affected by the easement, although both estates were originally united in the same owner, and one of them was afterwards granted by him with the benefit, while the other was left subject to the burden. All these kinds of property, however — all these holdings — are well known to the law and familiarly dealt with by its principles. But it must not, therefore, be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient, both to the science of the law and to the public weal, that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives — that is, their assets real and personal — to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all hands however remote.”

The above passage from Lord Brougham’s judgment has been quoted at length, as that judgment has been cited with approbation and followed in recent cases; “but it must be remembered that although any burden of a new species which the owner thinks proper to impose on his land is not an easement which can be made appurtenant to land, yet that such an obligation is perfectly valid as between the grantor and grantee of the right, and if the grantee is disturbed in his enjoyment by the grantor, the law will afford him ample remedy by action on covenant for the injury; and in the event also of his being disturbed by a stranger, he may sue for such disturbance in the name of the grantor. The cases already cited are authorities to that effect, and the principle was very clearly expressed by Mellish, L. J., in a recent case reported since the first edition of this work was published. The decision was directed to a different point, but incidentally the lord justice

^a *Ackroyd v. Smith*, 10 C. B. 164; 19 L. J. C. P. 315; *Hill v. Tupper*, 2 H. & C. 121; 32 L. J. Exch. 217.

said, that, in his opinion, there was a distinction between the case under consideration, which was a case relating to a right to light granted by deed, and the cases referred to by the master of the rolls, whose decision was then under appeal. In those cases there was no grant at law at all, but the right had merely come into existence by covenant. "Where," he said, "the right comes into existence by covenant, the burden does not run at law with the servient tenement at all; but a court of equity says, that a person who takes it with notice that such a covenant has been made, shall be compelled to observe it. That is the ordinary case, where there is such a covenant as I before referred to, that a person shall have an uninterrupted view from his drawing-room window, because the law will not allow the owner of land to attach an unusual and unknown covenant to the land, so that a man who buys the property in the market without knowing that it is subject to any such burden, would find that some previous owner had professed to bind all subsequent owners by an obligation not to obstruct the view which somebody else would have from the windows of his house. In such a case as that, though the man who makes the covenant is liable, yet those claiming under him are not liable at law; but the court of equity says, that if a purchaser has taken the land with notice of that contract, it is contrary to equity that he should take advantage of that rule of law to violate the covenant. But in the case of a grant of a well known easement, such as a right to light, or a watercourse, or a right of way, or any of the numerous easements which are well known to the law, when they are once validly created, the right passes at law, and the owner and occupier of the dominant tenement may maintain an action against the occupier of the servient tenement if the right is interfered with; and in all such cases the rule in equity ought to follow the law." ^b

It has already been said that natural rights are inherent in land, but that easements can be created only by the act of man. When easements have been created it frequently happens that they are at variance with

Easements
adverse to
natural
rights.

^b *Leech v. Schweder*, L. R. 9 Ch. App. at p. 475; 43 L. J. Ch. at p. 491.

natural rights, and the question may be asked, which of the rights is in such case to give place to the other. The effect of the creation of an adverse easement is to cause suspension of the natural rights during its existence, and if the easement is at any time extinguished the natural rights instantly revive.^c It may further be observed that it is not in the nature of natural rights to be inconsistent one with another, for the natural rights of one person are so limited by the natural rights of others, that where the rights of one begin the rights of the others end. Thus, if one person has a natural right to the flow of the water of a stream, his right is not to the uninterrupted flow of *all* the water, but of all the water *minus* that quantity lawfully used by other persons higher up the stream, for by virtue of their natural right they may use a reasonable quantity of the water as it flows by their land; so, also, the natural right of a landowner to use the water of a stream is not a right to use any quantity he thinks proper, but his right is so limited by the natural right of other persons to the uninterrupted flow of the water, that he may not by such user cause the latter material and sensible injury.^d To this it may be added that natural rights cannot be affected by the enjoyment of natural rights by another person; thus, if a privilege in the nature of an easement is used adversely to a natural right, the natural right is curtailed or entirely suspended when an easement is acquired; but if a natural right is used, such user, however long continued, would not cause the imposition of any new or increased burden on the servient tenement, or in any way affect the natural rights of the servient owner.^e

Inconsistent easements cannot coexist. When an easement has been created the rights of the servient owner are limited by that easement, and he cannot grant a right to a third person inconsistent with the existing easement. Neither can an easement which would be incon-

Inconsistent easements.

^c *Bealey v. Shaw*, 6 East, 209; *Wright v. Howard*, 1 Sim. & St. 190; 1 L. J. Ch. 94; *Sampson v. Hoddinott*, 1 C. B. N. S. 590.

^d *Wright v. Howard*, 1 Sim. & St. 190; 1 L. J. Ch. 94.

^e Per Cresswell, J., in *Sampson v. Hoddinott*, 1 C. B. N. S. at p. 611.

sistent with an existing easement of another person be acquired by prescription, for a right can be acquired by prescription only when a grant can be presumed; but independently of this, another reason has been given, namely, that "when a man has a lawful easement or profit by prescription from time whereof, &c., another custom, which is also from time whereof, &c., cannot take it away, for the one custom is as ancient as the other; as if one has a way over the land of A. to his freehold by prescription from time whereof, &c., A. cannot allege a prescription or custom to stop the way."^f Probably if user, inconsistent with an existing easement, whether acquired by express grant or by prescription, were submitted to by the dominant owner for a period of sufficient duration to establish an adverse prescriptive right, the law would presume that the original easement had been released and extinguished, and a right to the new and inconsistent easement might be upheld.^g

But although inconsistent easements cannot coexist, one easement of a character inconsistent with another may be created subordinate to the latter, and in that manner the two may coexist. Thus, if one man has a right to the uninterrupted flow of the water of a stream to his mill, another may have a right to divert the water when it is not required for the mill.^h So, also, easements may be acquired in streams of water flowing near tin mines in Cornwall, where the custom of tin-bounding prevails; but such easements are subordinate to the rights of the tin-bounders under the custom of the county.ⁱ

There remains but one class of easements to be noticed in this place, and that class is *Easements of Necessity*. It frequently happens that property is acquired in such a situation that, unless the owner is permitted

Subordinate easements.

Easements of Necessity.

^f Aldred's case, 9 Coke, 58.

^g Regina v. Chorley, 12 Q. B. 515.

^h Rolle v. Whyte, L. R. 3 Q. B. at p. 302; 37 L. J. Q. B. at p. 116; Blatchford v. Mayor of Plymouth, 3 Bing. N. C. 691; 6 L. J. N. S. C. P. 217.

ⁱ Gaved v. Martyn, 34 L. J. C. P. 353; 19 C. B. N. S. 732.

to make use of his neighbor's land, the property is inaccessible and worthless. The most common instance of this kind of easements occurs when a piece of land is wholly surrounded by the ground of other persons, so that unless the owner were permitted to pass over the surrounding ground, he would have no means of getting to his own land and it would be worthless. In this and similar cases the law generally steps in, and the landowner becomes entitled to an easement of necessity.^j By this means an owner of mines becomes entitled, if there is no other way by which he can gain the minerals, to dig through the surface land for that purpose, and when gained to carry the minerals away over that land;^k and in like manner it has been held that if a contract be made with the owner of a steam-engine for liberty to use the engine to work a machine set up in a room belonging to the owner of the engine, a right is also obtained to stand in the room to work the machine, for otherwise the contract would be nugatory.^l It will, however, be seen hereafter, that it is not in every case in which property is inaccessible that the law affords the owner an easement of necessity; for such easements, to come into existence, must arise under an implied grant of the right, and if a grant of the easement cannot be presumed, no easement of necessity is given by the law.

When easements of necessity are permitted. With reference to easements of necessity, it is an important question whether they can be allowed to a landowner only when his land would be utterly useless without them, or whether they are to be given him when it is merely a matter of great moment to him to have them, though he might use his land with more or less advantage without them.¹ Opinion on this has varied from time to time; but though there is an expression of opin-

^j *Dand v. Kingscote*, 6 M. & W. 174; 9 L. J. N. S. Exch. 279; *Gayford v. Moffatt*, L. R. 4 Ch. App. 133; *Clark v. Cogge*, Cro. Jac. 170.

^k *Rogers v. Taylor*, 1 H. & N. 706; 26 L. J. Exch. 203; *Goold v. Great Western Deep Coal Company*, 12 L. T. 842; 13 L. T. 109; 2 De G., J. & S. 600; *Rowbotham v. Wilson*, 8 H. L. C. 348; *Hext v. Gill*, L. R. 7 Ch. App. 699; 41 L. J. Ch. 761.

^l *Rex v. Inhabitants of Mellor*, 2 East, 188.

¹ See, further, *post*.

ion in a recent case which tends the other way, the question may be asked, whether it is not reasonable and proper to limit the existence of these rights to cases in which there is an absolute necessity, and to permit them in no other? It must be borne in mind how detrimental it generally is to an estate to be burdened with an easement; what a nuisance it is to an owner of land to have another person walking at his pleasure over a field, and how such a right may prevent building on the land, or using it in many of the ways the owner may desire. It must be borne in mind, also, that though it is requisite that a grant should be capable of being presumed in every case of an easement of necessity, yet these rights invariably arise when it is manifest that neither grantor nor grantee had any thought whatever about the subject. Does it not therefore seem unreasonable that easements of necessity should be allowed, and be presumed to be granted in cases in which there is no absolute necessity for their existence? The recent case alluded to above is *Watts v. Kelson*,^m and the easement was a right to a flow of water through a pipe. There had been a severance of an estate by sale of the dominant tenement, and before that severance the owner had used the pipe for conveying water from the servient to the dominant part of the estate; but it appeared that there were other supplies of water to the dominant part of the estate than that which was obtained by means of the pipe, though, possibly, the water so obtained was not so pure. It is only right, however, to observe that the case really turned upon the words used in the conveyance of the dominant tenement to the purchaser, but the court said: "It was objected before us, on the part of the defendant, that on severance of two tenements no easement will pass by an implied grant except one which is necessary for the use of the tenement conveyed, and that the easement in question was not necessary. We think that the watercourse was necessary for the use of the tenement conveyed. It was, at the time of the conveyance, the existing mode by which the premises conveyed were supplied with water; and we think it is no an-

^m 40 L. J. Ch. at p. 129; L. R. 6 Ch. App. at p. 175.

swer that if this supply were cut off some other supply might possibly be obtained. We think it is proved on the evidence that no other supply of water equally pure could have been obtained." The result, however, of the earlier decisions, seems to have been that easements of necessity could exist only when there was an absolute necessity for them to render the ownership of land beneficial;ⁿ but still it is right to notice that in *Morris v. Edgington*,^o Mansfield, C. J., expressed an opinion that it would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had.

SECT. 2. — *On the Nature of Particular Easements.*

The first section of this chapter was devoted to the consideration of the Nature of Easements generally; that is, those rules and principles of law relating to their nature which are applicable to easements of all kinds; and it was also attempted fully to explain what was meant by the word "Easement," and to point out the distinction between Easements, commonly so called, and that other class of easements generally termed Natural Rights. Besides these rules and principles of law, however, there are some which relate to particular easements only; and these it is purposed to discuss in the present section.

AIR.

The first subject to which attention is now to be directed is the air, for there are two kinds of rights in connection with the air to which an owner of land may at law be entitled. The first kind is rights which have reference to the free and uninterrupted passage of air, and the second is those which have reference to purity of air.

Light and air in many particulars resemble each other, and the rules of law regarding the right to free passage of light and air are identical, except in the case of

ⁿ *Holmes v. Goring*, 2 Bing. 76; 2 L. J. C. P. 134; *Proctor v. Hodgson*, 10 Exch. 824; 24 L. J. Exch. 195.

^o 3 Taunt. at p. 31.

certain rules relating to light which were established by the Prescription Act; for that statute contains a clause specially relating to the acquisition of rights to uninterrupted passage of light, but makes no provision for the acquisition of rights to uninterrupted passage of air. For the purpose of the present chapter it will be more convenient to discuss the nature of the rights to free passage of light and air together, and the reader is, therefore, referred to the subject "Light" for this purpose.^p

Every owner of land has a natural and common law right that the air which passes to his land shall not be polluted by other persons, and any person who, without an acquired right, pollutes the air which passes to his land is guilty of a wrongful act.^q

The expression "an acquired right" is here used because a right may be acquired, as will be shown hereafter, to pollute the air which passes from the land of one person to that of another. Such a right, when acquired, is an easement.^r

The natural right to purity of air, like all other rights of that nature, is, to a certain extent, limited by the natural rights of other persons. There is no inflexible rule of law that a landowner is entitled to have the air which naturally comes to him absolutely and entirely free from pollution, for such a rule would altogether put an end to many of the necessary and ordinary pursuits of life by the exercise of which the air is, to some extent, polluted. The air is provided for the common good of mankind, to be used by each person to whom it comes for his own benefit, and the natural right of each man to purity of air is therefore limited by the natural right of all other persons to use the air for their own purposes, although by such user it is rendered to some degree less pure than it otherwise would have been.

^p *Post*, p. 31. Though a right to uninterrupted passage of air to a window may be acquired, the law will not recognize a prescriptive right of uninterrupted passage of air to a windmill; *post*, chapter II.

^q *Bliss v. Hall*, 4 Bing. N. C. 183. See *Commonwealth v. Upton*, 6 Gray, 473.

^r *Flight v. Thomas*. 10 A. & E. 590.

The right to purity of air is well described by Knight Bruce, V. C., in *Walter v. Selfe*,^s in which case an injunction was sought to restrain brick-burning and the consequent pollution of the air. It was decided that the occupier of a house is entitled to an untainted and unpolluted stream of air for the necessary supply and reasonable use of himself and his family, "meaning," said the vice chancellor, "by untainted and unpolluted air, not necessarily air as fresh, free, and pure as at the time of building the plaintiff's house the atmosphere then was, but air not rendered to an important degree less compatible, or at least not rendered incompatible, with the physical comfort of human existence — a phrase to be understood, of course, with reference to the climate and habits of England." So, also, in delivering the judgment of the Court of Exchequer, in *Wood v. Waud*,^t and speaking of the diminution of the water of a stream by the ordinary use of the persons living on its banks, Pollock, C. B., referring to pollution of air, said: "And it may be conceived that if a field be covered with houses, the ordinary use by the inhabitants might sensibly diminish the stream; yet no action would, we apprehend, lie any more than if the air was rendered less pure and healthy by the increase of inhabitants in the neighborhood, and by the smoke issuing from the chimneys of an increased number of houses. But, on the other hand, as the establishment of a manufacture rendering the air sensibly impure by emitting noxious gases would be actionable, so it would be if it rendered the water less pure by the admixture of noxious substances."

It has been much debated whether the natural right to purity of air is not subject to the qualification that all persons may lawfully pollute the air if the cause of the pollution is the execution of any work essential for business or for the due enjoyment of life, provided the work is carried on in a reasonable and proper manner, and in a convenient and proper place, or if the exercise of a trade is a reasonable use by a person of his own land.^u This subject

Pollution
of air when
justifiable.

^s 20 L. J. Ch. at p. 434; 4 De G. & Sm. 315.

^t 3 Exch. at p. 781; 18 L. J. Exch. 315. See *Dana v. Valentine*, 5 Met. 8.

^u *Hole v. Barlow*, 4 C. B. N. S. 334; 27 L. J. C. P. 207; *Cavey v. Lid-*

relates not so much to the nature of the right to purity of air as to the disturbance of that right, and the circumstances under which such disturbance is justifiable. The subject will, therefore, be treated in another place.”

LIGHT.

It has already been said that light and air resemble each other in many particulars, and that the rules of law regarding the right to free passage of light and air are for the most part identical. Air and light are similar in many respects — they are provisions of nature for the good of all mankind alike, and every man has a natural right to use and enjoy them as he thinks proper, provided he does not cause unjustifiable damage to other persons. Light and air possess the same wandering, unstable character, and in that respect resemble water, and, like water, are the property of no one; water, however, is capable of being confined for use, and, while confined, it becomes the subject of property; but this is not the case with light and air. As is the case with the water of a stream, there is a natural right to the use of all the light and air which flows naturally to land; but light and air differ from water in this, that whereas the natural right to the flow of the water of a natural stream is paramount, and no man is justified in obstructing that water or preventing it flowing in its ordinary course to the land of other persons, the natural right to the flow of light and air is subordinate to the right, incident to property, which every person has to build on his own land; if, therefore, a landowner without right (for a right may be acquired) obstructs the water of a natural stream, he is liable to an action for damages; but if he, in the exercise of his right to build, obstructs the light and air, and prevents them passing to his neighbor, he is not guilty of any wrongful act, and is not responsible for injury caused, unless his neighbor has acquired a

better, 13 C. B. N. S. 470; 32 L. J. C. P. 104; *Bamford v. Turnley*, 3 B. & S. 66; 31 L. J. Q. B. 286; *St. Helen's Smelting Company v. Tipping*, 11 H. L. C. 642; 35 L. J. Q. B. 66.

^v See *post*, chapter IV.

Light, air,
and water
compared.

right that the light and air shall not be obstructed. Water may not be obstructed unless the obstructor has acquired a right to obstruct it; light and air may be obstructed, unless the person obstructed has acquired a right to uninterrupted enjoyment.

It is the undoubted right of every man who owns a house or other building to open any windows he pleases for the purpose of admitting the light and air which will naturally enter; and even though his house immediately adjoins the land of another person, no legal injury is caused by him if he opens windows overlooking that land;^w but, as was remarked above, the natural right to the reception of light and air is subordinate to the right, incident to property, which every person has to build on his own land; if, therefore, a householder open a new window which, by disturbing the privacy of a neighbor or otherwise, is a nuisance to him, or if the latter is unwilling that a right to have the light uninterrupted should be acquired by the owner of the house (for such a right would be acquired after the lapse of twenty years), he may exercise his superior right of building on his own ground, notwithstanding the erection totally deprives the householder of the light and air which would otherwise enter the new window.^x “Before dealing with the present appeal,” said Lord Westbury, C., in *Tapling v. Jones*,^y “it may be useful to point out some expressions which are found in the decided cases, and which seem to have a tendency to mislead; one of these expressions is the phrase ‘right to obstruct.’ If my adjoining neighbor builds upon his land and opens numerous windows which look over my gardens or my pleasure-grounds, I do not acquire from this act of my neighbor any new or other right than I before possessed. I have simply the same right of building or raising any erection I

^w Per Cresswell, J., in *Truscott v. Merchant Taylors’ Company*, 11 Exch. at p. 864; 25 L. J. Exch. at p. 176; *Mahan v. Brown*, 13 Wend. 261. See *Potts v. Smith*, L. R. 6 Eq. 318.

^x Per Cresswell, J., in *Truscott v. Merchant Taylors’ Company*, 11 Exch. at p. 864; 25 L. J. Exch. at p. 176; *Frewen v. Phillips*, 11 C. B. N. S. 449; 30 L. J. C. P. 356.

^y 11 H. L. C. at p. 305; 34 L. J. C. P. at p. 345.

please on my own land, unless that right has been by some antecedent matter either lost or impaired, and I gain no new or enlarged right by the act of my neighbor." The erection of a wall or other obstacle is indeed the only remedy available to a landowner, if he is annoyed by the opening of new windows overlooking his ground; he can maintain no action,¹ nor can he obtain other relief at law or in equity; for disturbance of privacy is not an injury which the law will recognize.² In building to obstruct new windows, however, a landowner must be careful to avoid obstructing ancient lights.^a

Though an owner of a house or other building acquires no right by opening a new window to have the light and air which would naturally enter unobstructed by the owner of the adjoining land, still the law suffers such a right to be acquired after the lapse of twenty years. This method of acquiring a right, which will be found fully discussed in the next chapter, varies in the case of light and in the case of air; for the acquisition of a right to light by prescription is regulated solely by the statute law,^b whereas a prescriptive right to have air unobstructed can be acquired only by prescription at common law.

Right to have light and air unobstructed.

A right to have the light and air which would naturally flow to a window unobstructed by the owner of adjoining land, whether such right is acquired by prescription or otherwise, is an easement.

Right to light and air is an easement.

SUPPORT.

The next subject to which attention is directed is the right to support for land and buildings.

Every person has a right *ex jure naturæ* that his own land shall not be disturbed by the removal of the support naturally

¹ Mahan v. Brown, 13 Wend. 261.

² Re Penny and the South Eastern Railway Company, 7 E. & B. 660; 26 L. J. Q. B. 225. Per Kindersley, V. C., in Turner v. Spooner, 1 Dr. & Sm. 467; 30 L. J. Ch. at p. 803; Chandler v. Thompson, 3 Camp. 80.

^a See *post*, chapter IV.

^b Prescription Act (2 & 3 Wm. IV. c. 71), s. 3. See *post*, chapter II.

rendered by the subjacent and adjacent soil. It is evident that if land or mine owners were at liberty to excavate without re-

Natural
right to
support.
Not in re-
spect to
buildings
on the
land.

gard to the support required by their neighbor's land, the neighbors would have no security that their ground would not at any moment be rendered useless by sinking into a subjacent or adjacent mine.

The law, therefore, annexes to the ownership of land a natural right that the landowner shall be entitled to sufficient support for his ground from the subjacent and adjacent soil.^c The right *ex jure naturæ* to lateral or *adjacent* support was determined many years before it was decided that a similar right existed when land was divided horizontally; *i. e.* the surface belonging to one person, and the subjacent mines to another. The right to *subjacent* support was first determined in the cases of *Humphries v. Brogden*, in which the court, after considering the right to lateral support, and the reasons why the law conferred such a right, held, that for similar reasons a right to support for land from the subjacent minerals was also given by law. This decision has been repeatedly approved, and the natural right to subjacent as well as adjacent support confirmed by subsequent decisions.^d

The natural right to support, then, being established by law, it is necessary to understand what is the exact nature of this right — that is, to what are landowners really by law entitled. The right to support is not a right to a particular means of support — as, for instance, if support has always been received from subjacent coal, that

^c *Humphries v. Brogden*, 12 Q. B. 739; 20 L. J. Q. B. 10; *Wyatt v. Harrison*, 3 B. & Ad. 871; 1 L. J. N. S. K. B. 237; *Hunt v. Peake*, Johns. 705; 29 L. J. Ch. 785; *Foley v. Wyeth*, 2 Allen, 132; *Thurston v. Hancock*, 12 Mass. 220 (1815), the leading case in America on this point. *Lasala v. Holbrook*, 4 Paige, 169; *Radcliff v. Mayor of Brooklyn*, 4 Comst. 195; *Richardson v. Vermont Central Railroad*, 25 Vt. 465; *Farrand v. Marshall*, 19 Barb. 380, and 21 Ib. 410; *No. Trans. Co. v. Chicago*, 99 U. S. 635; *Stevenson v. Wallace*, 27 Gratt. 77.

^d *Smart v. Morton*, 5 E. & B. 30; *Harris v. Ryding*, 5 M. & W. 60; *Rowbotham v. Wilson*, 8 H. L. C. 348. See *Jones v. Wagner*, 66 Penn. St. 430; *Coleman v. Chadwick*, 80 Ib. 81; *Marvin v. Brewster Min. Co.* 55 N. Y. 538; *Horner v. Watson*, 79 Penn. St. 242.

the coal, or a certain portion, sufficient to sustain the superincumbent weight of the soil, shall never be removed ; but it is a right that the ordinary enjoyment of land shall not be interrupted, so that until the enjoyment of the surface land is disturbed, the owner has no right to complain of the removal of the minerals.^e It is therefore perfectly justifiable for a mine owner to excavate the whole of the minerals, and substitute artificial props to support the surface land in lieu of the natural means of support which he has removed.¹

It is obvious that as the soil in one locality varies from the soil in another, so the support required to maintain one kind of soil in its natural position will be greater or less than that which is requisite to support another : a sandy soil is more liable to crumble and fall into a mine than clay or rock, and a question therefore arises as to the degree of support to which the owner of surface land is entitled. Lord Campbell, in delivering the judgment of the Court of Queen's Bench in the case of *Humphries v. Brogden*,^f has answered the question ; for he said : “ We likewise think that the rule giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation, or covenant, must be laid down generally without reference to the nature of the strata, or the difficulty of propping up the surface, or the comparative value of the surface and the minerals. We are not aware of any principle upon which qualifications could be added to the rule ; and the attempt to introduce them would lead to uncertainty and litigation ; greater inconvenience cannot arise from this rule, in any case, than that which may be experienced where the surface belongs to one owner and the minerals to another, who cannot take any portion of them without the consent of the owner of the surface. In such cases a hope of reciprocal advantage will bring about a compromise, advantageous to the parties and

Natural
right to
support is
absolute
and un-
limited.

^e *Backhouse v. Bonomi*, per Lord Cranworth, 9 H. L. C. 503 ; 34 L. J. Q. B. 181.

¹ This was expressly adjudged in a recent case in Pennsylvania, *Bell v. Reed*, 31 Legal Int. 389, as applied to *lateral* support.

^f 12 Q. B. at p. 745 ; 20 L. J. Q. B. at p. 13.

to the public. Something has been said of a right to a reasonable support for the surface ; but we cannot measure out degrees to which the right may extend ; and the only reasonable support is that which will protect the surface from subsidence, and keep it securely at its ancient and natural level." If the soil is of such a character that the subjacent mines cannot possibly be worked without causing the surface land to subside, it has been held, in conformity with the above-mentioned doctrine, that the mines cannot be worked at all.⁹

A novel question recently arose in *Mayor of Birmingham v. Allen*,¹ as to the meaning of "adjacent lands" in determining the extent of the right of support. It was held not to be necessarily confined to land *immediately* adjacent.

The plaintiff and the defendant were the owners of parcels of land, separated from each other by a narrow strip of land belonging to a third person. The owner of this intervening strip had, many years ago, worked out the coal beneath it. The subsequent working by the defendant of the coal under his own land caused, or threatened to cause, a subsidence of the plaintiff's land ; and this action was brought to restrain him from such working. In considering the law applicable to the case, the master of the rolls, starting with the proposition that a landowner is entitled to have his land, in its natural state, supported by the land of his neighbor, said : " Who is his neighbor ? The neighboring owner for this purpose must be the owner of that portion of land — it may be a wider or a narrower strip of land — the existence of which in its natural state is necessary for the support of my land. That is my neighbor for that purpose ; as long as that land remains in its natural state, and it supports my land, I have no right beyond it, and therefore it seems to me that that is my neighbor for this purpose. There might be land of so solid a character, consisting of solid stone, that a foot of it would be enough to support the land. There might be other land so friable, and

⁹ *Wakefield v. Duke of Buccleuch*, L. R. 4 Eq. 613 ; 36 L. J. Ch. 763 ; *Hext v. Gill*, L. R. 7 Ch. App. 699 ; 41 L. J. Ch. 761.

¹ 6 Ch. Div. 284 ; 37 L. T. Rep. N. S. 207 (1877).

of such an unsolid character, that you would want a quarter of a mile of it; but, whatever it is, as long as you have got enough land on your boundary which, left untouched, will support your land, you have got your neighbor, and you have got your neighbor's land to whose support you are entitled. Beyond that, it would appear to me that you have no rights." It appearing, however, that in this particular case the intervening strip would have afforded, if left in its natural state, a sufficient support to the plaintiff's land, the court said: "The plaintiffs have no right as against the landowners on the other side of that intervening space, and they acquire no right, whatever the owner of the intervening land may have done. If the act of the intervening owner has been such as to take away the support to which the first landowner who complains is entitled, then, for whatever damage occurs from the act which he has done, the first owner may have an action; but an action against the *intervening owner*, not an action against the owner on the other side; and it appears to me that it would be really a most extraordinary result that the man upon whom no responsibility whatever originally rested — who was under no liability whatever to support the plaintiff's land — should have that liability thrown upon him without any default of his own, without any misconduct or any misfeasance on his part. I cannot believe that any such law exists, or ever will exist."

The Court of Appeals sustained the decision of the master of the rolls, Brett, L. J., saying: "Although, therefore, this is a case of first impression, — that is to say, a case in which we have, after the master of the rolls, for the first time, to decide what is the proper definition of 'adjacent lands,' — I think the master of the rolls has given a very happy definition of them, and one which we ought to accept."

There is one class of cases which may be noticed here, though they will be mentioned again hereafter,^h in which the law does not confer any natural right to support; or, to speak more correctly, in which the natural right to support is taken away: that hap-

Deprivation of natural right to support by statute.

^h See *post*, chapters II. and IV.

pens when severance of surface land from subjacent mines is effected by compulsory purchase under the Lands and Railways Clauses Consolidation Acts, 1845, or under private acts containing provisions similar in character to those contained in them. This result depends solely upon the particular words of the statutes, and has no reference to the general nature of the natural right to support.

It is commonly said that the natural right to support continues only while land remains in its natural condition, unburdened with houses; this is not correct, for the natural right remains, though houses are built; but the owner of land cannot suddenly increase his right, or impose a new or additional burden on the servient tenement by erecting buildings, and the servient owner is therefore not responsible if the land sinks when he excavates, *if the sinking is produced by the increased weight the dominant owner has imposed on the surface*. That the natural right continues, is clear from the decisions in the cases of *Brown v. Robins*,ⁱ and *Stroyan v. Knowles*,^j in which it was held that an action would lie for removal of the support, necessary for the adjoining land in its natural condition, notwithstanding houses had been recently erected on the surface, provided the weight of the houses did not produce the sinking of the land — that is, provided the land would have sunk in the same manner if no houses had been erected. And such is undoubtedly the law in America.¹ The question has, apparently, never arisen, whether the natural right to lateral support for surface land remains when the subjacent soil has been excavated in such a manner that the surface would sink more readily if the adjacent soil were removed; but as the erection of houses on the surface does not cause the extinction of the natural right, so it is thought that excavation of the subsoil would not, and that the adjacent owner would still be

ⁱ 4 H. & N. 186; 28 L. J. Exch. 250.

^j 6 H. & N. 454; 30 L. J. Exch. 102.

¹ The damages being limited to the injury to the *land*. *Foley v. Wyeth*, 2 Allen, 131; *Thurston v. Hancock*, 12 Mass. 220; *Lasala v. Holbrook*, 4 Paige, 169; *Gilmore v. Driscoll*, 122 Mass. 199.

liable for damage if he removed his soil in such a manner that the ground would have sunk had it remained in its natural condition. The case of *Partridge v. Scott*^k arose out of damage to houses erected on excavated land caused by removal of lateral support and is no authority on the point of infringement of the natural right.

SUPPORT FROM UNDERGROUND WATER TO SURFACE LAND.

It sometimes happens that, owing to the porous nature of land, or from other circumstances, water naturally or accidentally oozes under the soil, or into old and abandoned mines, and that this water, by means of its natural upward pressure, affords material support to the surface land. The owner of the land has no natural right to support from such water, though it is possible that a right to such support as an easement might be acquired. The *North Eastern Railway Company v. Elliott*^l was the case of an abandoned mine accidentally flooded, but the question of natural right to support was not raised: the vice chancellor, Sir W. Page Wood, decided that the plaintiffs had no right to support for their railway bridge, which received support, as the water got into the mine by accident, and the flooding was known to be accidental, and that, as all parties concerned were living in a mining district, where it was well known that when a mine is drowned it is sometimes revived after a long period of time, it was for the company to have stipulated that the accidental state of circumstances should not be varied, if it was intended that the company, when it purchased the land, should have the benefit of the support from the water. *Popplewell v. Hodgkinson*^m was the case of some cottages built on land of a wet and spongy character, the land not having been properly drained; the adjoining land was sold for the purpose of erecting a church, and on excavation for the foundations, the water was drawn from the spongy land, the surface subsided and cracked, and dam-

^k 3 M. & W. 220; 7 L. J. N. S. Exch. 101.

^l 1 John. & H. 145; 29 L. J. Ch. 808; on appeal to L. C. 30 L. J. Ch. 160; and to H. L. 10 H. L. C. 333.

^m L. R. 4 Exch. 248; 38 L. J. Exch. 126.

age ensued to the cottages. The Court of Exchequer Chamber decided in favor of the defendant, merely stating that there is nothing at common law to prevent the owner of land draining his soil if it is necessary or convenient for him to do so, though he might by grant, express or implied, oblige himself to suffer the underground water to remain.

Though, therefore, it is to be taken as a general rule that there is nothing in the fact that surface land is supported by underground water, to prevent a person from draining his ground, and so removing the support from his neighbor's soil, yet the rule is different in the case of surface water supported by underground water, if the surface water is in a defined and regular stream. It may seem that this matter belongs rather to the subject of rights relating to underground water than to rights relating to support, and that it would be more proper to reserve it for consideration when rights as to underground water are discussed. The matter will be again referred to hereafter when that subject is under consideration; but it will be useful to notice it here, as there has been a recent case on the subject, in order to mark the distinction that has arisen between the support of land and the support of water from underground water. In the case of *The Grand Junction Canal Company v. Shugar*,^a the facts were that the company had a right to use the water of a stream which flowed from a pond to supply their canal. The defendant, who represented a local board of health, made a drain which collected and took away the underground water, and it seemed that by so doing the support was taken away from the surface water, which sunk to a lower level, and the company's supply was lessened. The lord chancellor held that although it is ordinarily a lawful thing to collect any water that may percolate underground, yet if it cannot be got without touching the water in a defined surface channel it must be left alone; and thus there is this great difference, that if underground water supports lands and buildings the support may be removed, be the consequences what they will; but if it supports other water in a defined

^a L. R. 6 Ch. App. 483.

stream it can in no case be touched if the water of the stream would be caused to sink into the ground. This, at first sight, appears to be an unreasonable distinction to make ; but it will be seen hereafter that there are sundry important and valuable rights in connection with flowing streams with which the ordinary right to collect underground water and to drain land is brought into some conflict, and it, in reality, becomes a question which of these rights must be treated as subordinate to the other. The lord chancellor was clearly of opinion that the right to collect underground water must be treated as subordinate to the rights which other persons have in surface streams, and, explaining his reasons, he said : “ As far as regards the support of the water, all one can say is this : I do not think *Chasemore v. Richards*, or any other case, has decided more than this, that you have a right to all the water which you can draw from the different sources which may percolate underground ; but that has no bearing at all on what you may do with regard to water which is in a defined channel, and which you are not to touch. If you cannot get the underground water without touching the water in a defined surface channel, I think you cannot get at it at all. You are not by your operations, or by any act of yours, to diminish the water which runs in this defined channel, because that is not only for yourself, but for your neighbors also, who have a clear right to use it and have it come to them unimpaired in quality and undiminished in quantity.” This decision only refers to injuries to surface streams, but it may be a question how far the principle on which it was based is applicable to standing water in which valuable rights exist. This will be noticed in the next division of this section.

EASEMENT OF SUPPORT FOR BUILDINGS.

The natural right to support exists in respect of land only, and not in respect of buildings ; but a right to support for buildings, both from adjacent and subjacent land, may be acquired, and when acquired the right is an easement. “ If the plaintiff has enjoyed the support of the land of the defendant for twenty years to keep up his house, and both parties knew

of that support, the plaintiff had a right to it as an easement, and the defendant could not withdraw that support without being liable in damages for any injury that might accrue to the plaintiff thereby.”^o It has been thought some distinction exists between the right to subjacent and adjacent support for a house, and that the former is a natural right, while the latter is an easement. In *Rogers v. Taylor*,^p which was an action for damage sustained by a house through subjacent excavation, Pollock, C. B., stated that, as the owner of surface land has a right to enjoy it for all the purposes for which it is ordinarily applied, and among others for building a house, he would not say that it was necessary to prove a prescriptive right to support; and Watson, B., said that there appears to have been a distinction drawn in all the cases between lateral and vertical support, but that as to the latter it has always been held that the owner of the surface is entitled to the support of the subsoil. Cockburn, C. J., however, appears to have thought differently; for, in summing up to the jury at nisi prius, he laid it down that the plaintiff was not entitled to the support of the soil unless for twenty years the messuages had received that support, by which the right might be acquired. It is thought that of these, the opinion of Cockburn, C. J., is correct, and that a right to support for buildings is an easement which must in every case be acquired, and that it can never be claimed as a natural right. No authority is cited, and it is believed none existed, for the dicta of Pollock, C. B., and Watson, B., and no reason appears why a surface owner should be entitled to impose an

^o *Hide v. Thornborough*, per Parke, B., 2 Car. & K. 250; *Humphries v. Brogden*, 12 Q. B. at p. 749; 20 L. J. Q. B. at p. 14; *Partridge v. Scott*, 3 M. & W. 220; 7 L. J. N. S. Exch. 101; *Wyatt v. Harrison*, 3 B. & Ad. 871; 1 L. J. N. S. K. B. 237. But see the American law on this subject, *post*.

^p 2 H. & N. 828; 27 L. J. Exch. 173. In *Humphries v. Brogden* (12 Q. B. 739; 20 L. J. Q. B. 10), it was said by Lord Campbell, in judgment, that where there are separate freeholds from the surface of the land and the minerals belonging to different owners, the court was of opinion that the owner of the surface, *while unincumbered with buildings, and in its natural state*, is entitled to have it supported by the subjacent mineral strata.

additional burden on a mine owner because their estates happened to be severed horizontally, if he could not do so when their estates were severed vertically; in both cases the right to enjoy surface land for all the purposes to which land is ordinarily applied, and among others for the purpose of building houses, must be the same. In the cases to which Watson, B., refers, it will be found that the severance of the mines from the surface occurred after the houses were built, and that consequently a right to support would be acquired on severance by implied grant, and not as a natural right.^q In the case of *Harris v. Ryding*,^r the houses had been built on the surface after severance of the mines, and Parke, B., said: "It becomes unnecessary to inquire whether or not he was bound to leave support for an additional superincumbent weight upon the surface; *probably he would not be*," clearly showing that his opinion was that the right to support for the buildings must be acquired as an easement, and that there was no natural right.

If, instead of erecting buildings, and by that means imposing a greater burden on the adjoining land, the owner excavates the subsoil, and therefore renders the surface more likely to fall when the adjacent land is excavated, he cannot by such act impose a greater responsibility on the owner of the adjacent land, or increase his own natural right to lateral support; but after his land has been excavated for twenty years he may acquire an easement of support from the adjacent soil for his surface land in addition to his natural right.

It may be mentioned here, though it is rather beyond the scope of this treatise, that the mere fact of contiguity of buildings imposes an obligation on the owners to use due care and skill in removing the one building not to damage the other, even though no right to support has been acquired;^s but there is no obligation upon the owner of the building about to be removed to shore up the

Easement
of support
for exca-
vated land.

Effect of
contiguity
of build-
ings.

^q *Smart v. Morton*, 5 E. & B. 30; 24 L. J. Q. B. 260.

^r 5 M. & W. at p. 71; 8 L. J. N. S. Exch. at p. 185.

^s *Dodd v. Holme*, 1 A. & E. 493.

other building,[†] or to give the owner of the other building notice of the intention to remove his own.[‡] Although the fact of contiguity of buildings raises an obligation to use care and skill in removing one not to injure the other, that obligation cannot arise if, from the circumstance of the latter building being underground or otherwise, the party removing the former has no notice of its existence; for one degree of care would be required where no vault or building exists, but the soil is left in its natural and solid state, another where there is a vault, and another and still greater degree of care would be required where the adjoining vault is of a weak and fragile construction;[§] and it would be impossible to ascertain the precise degree of care required in the absence of notice of the existence of the building.

As the right to support for land is a natural right, the owner of surface land who is entitled thereto may confer upon the owner of the subjacent minerals an adverse right entitling him to disturb and let down the surface land when mining; the right to do this is an easement. Speaking of this easement, Lord Wensleydale said, in the House of Lords: "I do not feel any doubt that this was the proper subject of a grant, as it affected the land of the grantor; it was a grant of the right to disturb the soil from below, and to alter the position of the surface, and is analogous to the grant of a right to damage the surface by a way over it; and it was admitted at your lordships' bar that there is no authority to the contrary."[¶]

Recently, and since the first edition of this book was published, there have been several cases before the courts, in which a right to let down the surface of land, and even to do so to the injury of buildings, has been upheld, when it has appeared by deeds of conveyance or leases in which mines and the right to work them have been granted or reserved, to have

[†] *Peyton v. Mayor and Commonalty of London*, 9 B. & C. 725.

[‡] *Chadwick v. Trower*, 6 Bing. N. C. 1; 8 L. J. N. S. Exch. 286.

[§] *Chadwick v. Trower*, 6 Bing. N. C. 1; 8 L. J. N. S. Exch. 286.

[¶] *Rowbotham v. Wilson*, 8 H. L. C. at p. 362; 30 L. J. Q. B. at p. 53; *Murchie v. Black*, 19 C. B. N. S. 190; 34 L. J. C. P. 337.

been the intention of the parties that the mining owner should have a right to remove all the minerals and destroy all the support under the superincumbent land.^x

The nature and early history of the law of support are so much more accurately stated by Gray, C. J., in the recent case of *Gilmore v. Driscoll*,¹ than we have elsewhere found, that we beg leave to quote his own words. He there says, at p. 201: "The right of an owner of land to the support of the land adjoining is *jure naturæ*, like the right in a flowing stream. Every owner of land is entitled, as against his neighbor, to have the earth stand and the water flow in its natural condition. In the case of running water, the owner of each estate by which it flows has only the right to the use of the water for reasonable purposes, qualified by a like right in every other owner of land above or below him on the same stream. But in the case of land, which is fixed in its place, each owner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor; and, if the neighbor digs upon or improves his own land so as to injure this right, may maintain an action against him, without proof of negligence.

"But this right of property is only in the land in its natural condition, and the damages in such an action are limited to the injury to the land itself, and do not include any injury to buildings or improvements thereon. While each owner may build upon and improve his own estate at his pleasure, provided he does not infringe upon the natural right of his neighbor, no one can by his own act enlarge the liability of his neighbor for an interference with this natural right. If a man is not content to enjoy his land in its natural condition, but wishes to build upon or improve it, he must either make an agreement with his neighbor, or dig his foundations so

^x *Smith v. Darby*, L. R. 7 Q. B. 716; 42 L. J. Q. B. 140; *Eadon v. Jeffcock*, L. R. 7 Exch. 379; 42 L. J. Exch. 36; *Aspden v. Seddon*, L. R. 10 Ch. App. 394. See *Ryckman v. Gillis*, 57 N. Y. 68, a valuable case.

¹ 122 Mass. 199 (1877). And see *Richart v. Scott*, 7 Watts, 460; *McGuire v. Grant*, 1 Dutch. 356; *Shrieve v. Stokes*, 8 B. Monr. 453; *Charless v. Rankin*, 22 Mo. 566.

deep, or take such other precautions, as to insure the stability of his buildings or improvements, whatever excavations the neighbor may afterwards make upon his own land in the exercise of his right.

“In 2 Rol. Ab. 564, it is stated that in *Wilde v. Minsterley*, in 15 Car. I., it was decided in the King’s Bench, after a verdict for the plaintiff, that ‘if A. be seised in fee of copyhold land next adjoining to the land of B., and A. erects a new house upon his copyhold land, and some part of the house is erected upon the confines of his land next adjoining to the land of B., and B. afterwards digs his land so near to the foundation of A.’s house, but no part of A.’s land, that thereby the foundation of the house and the house itself fall into the pit, yet no action lies by A. against B., because it was A.’s own fault that he built his house so near the land of B., for he by his act cannot hinder B. from making the best use of his own land that he can. But it seems that a man who has land next adjoining to my land cannot dig his land so near my land that thereby my land shall go into his pit; and therefore, if the action had been brought for this, it would lie.’

“In the same court, in 15 Car. II., Justices Twisden and Windham said that it had been adjudged that, ‘if I, being seised of land, lease forty foot thereof to A. to build a house thereon, and other forty foot to B. to build a house, and one of them builds a house, and then the other digs a cellar in his land, whereby the wall of the first house adjoining falls, no action lies for that, because each one may make the best advantage of his digging;’ ‘but it seemed to them that the law is otherwise, if it was an ancient wall or house that falls by such digging.’ *Palmer v. Fleshees*, 1 Sid. 167. In another report, the corresponding statement is, that ‘it was adjudged that two having ground adjoining, the one built *de novo*, and the other in his ground digged so near, that the other fell, and no remedy, the house being new.’ *Palmer v. Flessier*, 1 Keb. 625. That adjudication is referred to in *Siderfin* as ‘7 Jac. in *Pigott and Surie’s case*,’ and in *Keble* as ‘7 Car.’ But *Sury v. Pigot*, decided in 1 Car. I., and fully reported in

Popham, 166, was upon another point, and is so stated in Keble, *ubi supra*; and it would seem that the reference intended may have been to the case of Wilde v. Minsterley, above cited.

“There are indeed two or three early cases, in which actions appear to have been sustained for undermining houses by digging on adjoining land. *Slingsby v. Barnard*, 14 Jac. I., 1 Rol. R. 430. *Smith v. Martin*, 23 Car. II., 2 Saund. 400. *Barwell v. Kensey*, 35 Car. II., 3 Lev. 171; S. C. 1 Mod. Entr. 195. But in *Slingsby v. Barnard*, and in *Smith v. Martin*, the objections made were not to the right to maintain the action, but only to particulars in the form of the declaration; and in *Barwell v. Kensey*, the declaration, as construed by the majority of the court, alleged not merely digging near the plaintiff's foundation, but digging that foundation itself.

“In *Tenant v. Goldwin*, 2 Ld. Raym. 1089, 1094, Lord Holt and Justice Powell are reported to have ‘held that a man cannot build so near another man's house as to throw it down.’ But the only point adjudged was the same as in *Ball v. Nye*, 99 Mass. 582, that a man is bound, of common right, to keep a vault upon his own land in repair, so that the filth shall not flow upon his neighbor's land, ‘for he whose dirt it is must keep it that it may not trespass.’ S. C. 1 Salk. 360, 361; 6 Mod. 311; 1 Salk. 21; Holt, 500. And upon a comparison of the various reports it is evident that the digging so near another's wall as to weaken it was not spoken of as giving a right of action to the owner of the wall, but as limiting his liability for the escape of filth caused by the new digging.

“The latest and the most authoritative statement of the law of England upon this point before the American Revolution is that of Chief. Baron Comyns, who, citing Rolle's Abridgment and Siderfin's Reports, *ubi supra*, says that an action upon the case lies for a nuisance, ‘if a man dig a pit in his land, so near that my land falls into the pit; but does not lie, ‘if a man build an house, and make cellars upon his soil, whereby an house newly built in an adjoining soil falls down.’ Com. Dig. Action upon the Case for a Nuisance, A., C.”

WATER.

There are three kinds of rights which may be acquired in connection with water: 1. Rights relating to the *flow* of water. 2. Rights relating to *purity* of water. 3. Rights relating to the *taking* of water for use. It is proposed to consider each of these classes separately.

Before doing this, however, it is right to observe that much difference exists in the cases of natural and artificial streams; it therefore becomes necessary to distinguish the one kind of streams from the other. A natural stream is one which arises at its source from natural causes, and flows in a natural channel; an artificial stream is one that arises by the agency of man, or though arising from natural causes, flows in a channel made by man.

That a stream which flows by the operation of nature only, and in a natural course, is a natural stream, there can be no doubt; but there is some doubt whether a stream which flows from a natural source, but in a channel of a permanent character made by man, ought not in some instances to be deemed a natural stream;¹ or, if merely an artificial stream, whether all the rights incident to a natural stream are not conferred by law on the owners of the adjacent land.² Until recently there was no actual decision on this point, reference having only been made to it by judges incidentally during arguments or

¹ Thus, in *New Ipswich Woolen Factory v. Bachelder*, 3 N. H. 190, the owner of a mill and land below it had constructed an artificial channel, or raceway, from his wheel pit, alongside and parallel to the natural stream, entering the same some distance below. He then sold the mill, retaining the land through which the raceway extended, not mentioning the same in the deed. It was held that such artificial channel was to be considered as a "parallel natural stream," and that the grantee of the mill had a right to have the water continue to flow therein through the grantor's land.

² *Nuttall v. Bracewell*, per Pollock, C. B., and Channell, B., L. R. 2 Exch. at p. 14; 36 L. J. Exch. 6; *Sutcliffe v. Booth*, 32 L. J. Q. B. 136. In *Nield v. The London and North Western Railway Company*, L. R. 10 Exch. 4; 44 L. J. Exch. 15, the expressions used by Amphlett, B., at the commencement of his judgment, appear to show that, in his opinion, a canal is not a stream of such a character that the rights which the law annexes to natural streams would be annexed to it.

judgments as expressions of opinion ; but in the case of *Holker v. Poritt*,² the question arose and was very fully discussed, and judgment upon it given by the Court of Exchequer. In that case it appeared that a natural stream at a certain point divided itself into two parts, one of which flowed naturally to a trough for watering cattle, and thus was a natural stream. At that point the water, after filling the trough escaped without any defined course on to land farther on, where it became dispersed, partly sinking into the ground and partly running away in small rills. More than twenty years before the action, the owner of the land made a reservoir to collect the scattered water, and from that made an underground drain to a mill, and the water flowed thence to a river. The question was, whether all the rights commonly belonging to owners of land on the banks of a natural stream were annexed to the stream in the drain beyond the reservoir. Here it was quite clear the drain was an artificial watercourse ; but the water flowed from a natural source, and till it entered the reservoir formed a natural stream, and before the drain was laid down it flowed naturally over the land where the drain was laid, though not in a defined course, — or sunk into it. The only effect of the drain, therefore, was to collect and conduct the water in a defined course through the land, where it would otherwise have trickled indefinitely, and not to bring an altogether new stream through land which would otherwise have been without the water, and the court held that under these circumstances, all the rights usually belonging to owners of land on the banks of natural streams were annexed to the stream in the drain, and it is presumed the owner of the drain was saddled with reciprocal obligations. The reasoning of Kelly, C. B., in his judgment, was this: “ What, in the contemplation of law, is the nature of this artificial stream or tunnel ? Suppose that, instead of a tunnel conveying the water into what are now the plaintiff’s premises, Walker (who made the drain and then was owner of the land) had cut an open drain, and so made a stream visible on the surface passing through his land, and on into the Irwell (the river from which the supply

² L. R. 8 Exch. 107; 42 L. J. Exch. 85.

of water originally came). If he had done so, I am of opinion that he, or any one claiming under him, through whose property this open stream passed, would have been as much entitled to the water running along it as if he had been the owner of land on the bank of the stream, between E. (the point where the natural stream divided) and the trough. It would have been a mere continuance of the stream. But the cases upon this subject establish the proposition that there is no difference in the contemplation of law between a stream visible to the eye and a stream conducted through a tunnel, nor any difference in the rights which may be acquired in them respectively. If this is so, on what ground is there any difference between the rights of the plaintiff in the stream, which now flows to him through a tunnel, and the rights which he would have had in an open stream passing into and through his land? I think there is none." Martin, B., said: "Walker, therefore, was entitled to have the stream flow in its ordinary course down to the place where the trough stood, and beyond which, twenty-five years ago, it was not continued in a defined channel to the Irwell, but was allowed to dissipate itself over the surface of the ground. Now, that state of things was exactly as if a stream lost itself in a marsh or swamp, a haunt for snipe and wild fowl, but not turned to any agricultural purpose. And I am of opinion that if a proprietor in such a case expends his labor in cutting a course for the water, he acquires a right analogous to that which he would have if that course had been a natural stream, and that no distinction can be made between a natural stream and a watercourse made to drain land and to carry down the water to its natural destination."

This decision is undoubtedly one of great importance, and it will be a matter of considerable interest to see how far the principle involved in it is applied to future cases. In many instances, no doubt, substantial justice will be obtained by its application; but that an underground pipe made by a landowner to convey water to a mill can in any case be deemed a natural watercourse, and that it shall, the moment it is laid down, invest its owner as against other landowners, it may be

miles away, with the important rights which the law annexed only to natural streams, is somewhat remarkable. The matter, too, is not only of importance as it affects others than the owner of the pipe, but as it affects him also; for if he becomes entitled to the rights of an owner of land on the banks of a natural stream, he must also be saddled with the obligations attendant upon that position, and it will probably often happen that those obligations will in their effect render his situation very detrimental to his interests. Thus, he will not be entitled at any time to take up the pipe and stop the flow of the water, or to alter its direction so as to deprive other persons lower down the stream of their usual supply, and he will not be able to use the water for any purpose other than an owner of land on the banks of a natural stream would be entitled to use it; that is, simply for the benefit of or in connection with the land adjoining the stream, and it is easy to see that many instances may occur in which an estate may become saddled with a heavy burden through the making of a drain which the owner only intended for his own benefit and possibly to serve a purpose really temporary, though in its character permanent.

When a stream is natural there can be no doubt that all waters which flow into it becomes a part of that stream, and subject to the same natural rights as the rest of the water, and that it makes no difference that the water so flowing to the natural stream was sent down by artificial means.“

Artificial
supply to
natural
stream.

It has been observed that much difference exists in the cases of natural and artificial streams regarding rights connected with water. The difference is, that there are certain natural rights which belong to all owners of land abutting on a natural stream which are incident to the ownership of the land, but there are no such rights incident to the ownership of land abutting on an artificial stream.^b Many rights *similar* to natural rights may be acquired in arti-

Natural
rights and
easements
in water.

^a Wood v. Waud, 3 Exch. at p. 779; 18 L. J. Exch. at p. 314.

^b Rawstron v. Taylor, per Parke, B., 11 Exch. at p. 382; Sampson v. Hoddinott, per Cresswell, J., 1 C. B. N. S. at p. 607.

ficial streams ; but they are easements, not natural rights. Easements may be created in both natural and artificial streams.

Land abutting on a stream, whether natural or artificial, is commonly called "Riparian Land," and hence the owners of that land are called "Riparian Owners," or "Riparian Proprietors." Similarly the natural rights to which reference has been made are called "Riparian Rights," but this expression is used exclusively to denote natural rights, and not easements which a riparian owner may have acquired in a stream either natural or artificial.

If a riparian estate is of very great extent, and stretches far away from the river's banks, the question may be asked whether riparian rights are incident to the whole of this estate simply because the whole of the land belongs to one person, who happens to be the owner of a portion of the river's banks, or whether they are limited to a part of his land. This question can, it is thought, only arise with reference to the riparian right to take water for use on the riparian land ; for, with regard to the other classes of riparian rights, the extent of the riparian estate can be a matter of no importance ; but, to answer the question, it would seem that the riparian right is incident to the whole riparian estate, of whatever size it may be ; but the enjoyment of the rights must be so limited that other riparian proprietors may not be subjected to injury from undue use of the water. Thus, it has been said, "in the above cited case of *Wood v. Waud*, it was observed, that in England it is not clear that an user to that extent" (that is, to the extent allowed in America and France) "would be permitted ; nor do we mean to lay down that it would in every case be deemed a lawful enjoyment of the water if it was again returned into the river with no other diminution than that which was caused by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor. This must depend upon the circumstances of each case. On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil abutting on one part of the

stream could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose; on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of degree, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not." ^c Though, therefore, it may be taken that riparian rights are incident to, and may be used for the benefit of, the whole of a riparian estate, whatever may be its extent, it is undoubtedly the case that these rights are incident to the estate in its character of riparian land, and that, if a riparian proprietor grants away a part of his estate not abutting on the stream, the riparian rights are lost as regards the part of the estate granted; and, for a similar reason, if a riparian owner grants his riparian rights apart from his riparian land, the grant, though good as between the immediate parties, is void, and has no effect as against parties other than the grantor. ^d

Partition
of a ripa-
rian estate.

Grant of
riparian
rights.

It should be mentioned that easements may be acquired in watercourses, although the stream of water, whether natural or artificial, is intermittent — that is, flowing at times only — and that natural rights may also exist in intermittent natural streams. In *Drewett v. Sheard* ^e a claim was made to divert and use certain "flash" water which flowed at times down a watercourse to a mill, and it

Intermit-
tent
streams.†

^c *Embrey v. Owen*, per Parke, B., delivering the judgment of the Court of Exchequer, 6 Exch. at p. 371; 20 L. J. Exch. at p. 217.

^d *Stockport Waterworks Company v. Potter*, 3 H. & C. 300; *Nuttall v. Bracewell*, L. R. 2 Exch. 1; 36 L. J. Exch. 1.

^e 7 C. & P. 465.

appeared that “flash” water was water which was let into a river and made to flow thence into the watercourse on certain days by means of sluices, so as to produce a sort of artificial tide to assist barges navigated on the river. Littledale, J., in summing up to the jury, said that there did not appear to him to be any objection in point of law to the right claimed, although it had been said by the counsel for the plaintiff that the claim of a right at the time of the flashes was extraordinary. In the case also of *Trafford v. Rex*,^f a watercourse used only in times of floods is mentioned.

It is important to observe, with regard to riparian rights, that the owner of the land in which a spring rises to the surface is in no different position, as regards other riparian proprietors, from the owner of land through which the water subsequently flows; that is, provided the water rises to the surface in a defined stream, and does not merely ooze through the soil in an indefinite course; for if it does that, a material difference exists, as will be presently shown. He may not, therefore, obstruct the flow of the water, or take it for use before it rises to the surface, or in any way deprive other riparian owners of the enjoyment of their natural rights.^g

Riparian rights are given by law whenever the course of a stream is known and defined, and it matters not whether the stream is on the surface of the land or under ground; but if the course is unknown, or not defined, no such rights are given. It was said by Pollock, C. B., in *Dudden v. The Guardians of Clutton Union*,^h that “if the channel or course underground is known, as in the case of the river Mole, it cannot be interfered with. It is otherwise when nothing is known as to the sources of supply; in that case, as no right can be acquired against the

^f 8 Bing. 204.

^g *Dudden v. The Guardians of Clutton Union*, 1 H. & N. 627; 26 L. J. Exch. 146; *Ennor v. Barwell*, 2 Giff. 410.

^h 1 H. & N. at p. 630; *Chasemore v. Richards*, 7 H. L. C. 349; 29 L. J. Exch. 81; *Ballacorkish Silver Lead and Copper Mining Company v. Harrison*, L. R. 5 P. C. 49; 43 L. J. P. C. 19.

owner of the land under which the spring exists, he may do as he pleases with it, and "if in mining or draining his land he taps a spring, he cannot be made responsible." Though, therefore, it is lawful to drain land, although by so doing the underground water which percolates through adjoining land is drawn off, yet if the abstraction of that affects a defined stream on the surface, and the water of that is caused to sink through the soil and to be drawn off too, it has been held that the drainage becomes unlawful.ⁱ If water oozing through the soil collects on the surface, or trickles away without any defined course, no riparian rights can be claimed, and it makes no difference that the water so collected on the surface would, if suffered to remain, ultimately trickle away and form part of a natural and defined stream; as long as such water remains on the land it is a nuisance, and prejudicial to cultivation, and the landowner is entitled at any time to drain his land, or get rid of the nuisance in any way he finds most convenient.^j But it has been held that if water comes in a natural defined stream to land, and then becomes dispersed over the land and trickles away without any defined course or sinks into the soil, and the landowner cuts a watercourse to collect and carry off the dispersed water, that watercourse may become a part or continuation of the natural stream so as to gain for the owner the ordinary riparian rights incident to natural streams.^k

These general principles having been explained, the next step is to consider the particular kinds of natural rights and easements to which a landowner may be entitled in connection with water. These rights were stated to be of three kinds: 1. Those which have relation to the flow of water; 2. Those which have relation to purity of water; 3. Those which have relation to the taking of water for use.

ⁱ *Grand Junction Canal Company v. Shugar*, L. R. 6 Ch. App. 483.

^j *Rawstron v. Taylor*, 11 Exch. 369; 25 L. J. Exch. 33; *Broadbent v. Ramsbotham*, 11 Exch. 603; 25 L. J. Exch. 115.

^k *Holker v. Poritt*, L. R. 8 Exch. 107; 42 L. J. Exch. 85. See *Macomber v. Godfrey*, 108 Mass. 219.

1. Of those rights which have relation to the flow of water, it is established by a series of decisions, commencing from a very early period, that every landowner has a natural right to the uninterrupted flow, without diminution or alteration, of the water of natural streams which pass his land in defined channels, and to transmit the water to the land of other persons in its accustomed course,¹ and this principle of law has been repeatedly recognized and affirmed by decisions of later date. Thus, in *Embrey v. Owen*,^m it is said: "The right to have the stream to flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes." And, again, in *Gaved v. Martyn*: "The flow of a natural stream creates mutual rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality." What use of flowing water is reasonable, frequently gives rise to difficult questions for the court to decide, and sundry decisions on the point are reported. The consideration of these, however, does not belong to this part of this treatise, but they will be noticed hereafter.^o

These riparian rights, like all other natural rights, may be temporarily destroyed or modified by the owner, if easements at variance with them be created by him, and acquired by other persons, either by grant or prescription. Thus a right may be acquired by a riparian

¹ *Sury v. Pigot*, Popham, 106; *Brown v. Best*, 1 Wils. K. B. 174; *Bealey v. Shaw*, 6 East, 209.

^m 6 Exch. at p. 369; 20 L. J. Exch. 216.

ⁿ 34 L. J. C. P. at p. 363; 19 C. B. N. S. 732. See, also, *Wood v. Waud*, 3 Exch. 748; 18 L. J. Exch. 305; *Mason v. Hill*, 3 B. & Ad. 304; 5 B. & Ad. 1; *The Wilts and Berks Canal Navigation Company v. The Swindon Waterworks Company*, per James, L. J., L. R. 9 Ch. App. at p. 457; 43 L. J. Ch. at p. 395; in H. L. 45 L. J. Ch. 638; L. R. 7 H. L. 697; *Stein v. Burden*, 29 Ala. 127; *Pettibone v. Smith*, 37 Mich. 579; *Dilling v. Murray*, 6 Ind. 324; *Prescott v. Williams*, 5 Met. 429.

^o See *post*, chapter III., on the "Extent and Mode of User of Easements," title WATER.

owner having land higher up the stream to divert or consume the water, and thus prevent it flowing in its accustomed course to the riparian land lower down;^p or a right may be acquired by the owner of land situated lower down the stream to bank up the water and pen it back so as to cause it to flood the land of other riparian owners situated above his on the stream.

The case of *Wright v. Howard*^q is frequently cited, as it contains a clear and accurate exposition of the law Wright v. Howard. on this subject. The judgment is that of Sir John Leach, V. C.; and his honor, after stating the facts of the case, continued: "The law on this subject is extremely simple and clear. *Primâ facie* every proprietor of land on the banks of a river is entitled to that moiety of the soil of the river which adjoins to his land; and the legal expression is that each is entitled to the soil of the river *usque filum aquæ*. Of the water itself there is no separate ownership; being a moving and passing body there can be no property in it. But each proprietor of land on the banks has a right to use it, consequently all the proprietors have an equal right; and, therefore, no one of them can make such an use of it as will prevent any of the others from having an equal use of the stream when it reaches them. Every proprietor may divert the water for the purpose, for example, of turning a mill; but, then, he must carry the water back into the stream so that the other proprietors may in their turn have the benefit of it. His use of the stream must not interfere with the equal common right of his neighbors. He must not injure either those whose lands lie below him on the banks of the river, or those whose lands lie above him. Injury may be done to the proprietors below him, by diminishing the quantity of water which descends to them; it may be done to those above him, by returning water upon them so as to overflow their lands, or to disturb any of the operations in which they may have occa-

^p *Bealey v. Shaw*, 6 East, 209.

^q 1 Sim. & St. 190; 1 L. J. Ch. 94. See, also, *Bickett v. Morris*, L. R. 1 Sc. Ap. 47, where the right of a riparian owner to build on the *alveus* of a stream is considered.

sion to use the water — as, for example, by diminishing the extent of its fall. Thus stand the common law principles with respect to the use of the water of rivers. But the right which I have to prevent my neighbors, whether above or below me, from so using the water as to interfere with my equal common right, may be the subject of grant. The law presumes it to be an injury to me to diminish the quantity of water descending to my lands, or the amount of its fall; but I may sell to those above me my right to have the water undiminished in quantity; or I may grant to my neighbors below me the privilege of erecting a weir, which will have the effect of lessening my fall. Thus an use and a right may arise different from the common use and the common right.”

As, therefore, an easement may be acquired, entitling a land-owner to divert the course of a natural stream, Right to have streams diverted. a question suggests itself whether a right cannot be acquired to have water which would otherwise flow to land diverted by another landowner higher up the stream. No doubt there can be such a right if it is created by the express agreement of the parties; but it is very doubtful if it can come into existence by any other means, except, of course, statutory enactment. It has been stated very distinctly by Cockburn, C. J., that an easement of that kind cannot be acquired by prescription, if the diversion has been an exercise of a right to divert by the higher landowner; or, in other words, that the servient owner who is bound to submit to the diversion of a stream, cannot, by the exercise of the easement, gain a right against the dominant owner, obliging him never to cease diverting,^{*} and this decision it is thought practically settles the question, for except when streams are diverted in exercise of easements, and when such diversions are for the benefit of the persons diverting, it is difficult to imagine a case when any owner of land would divert a stream in such a manner as to enable another to acquire a right against him.

The case of flood-water is different from that of flowing streams; but it may be mentioned in passing that every land-

^{*} *Mason v. Shrewsbury and Hereford Railway Company*, L. R. 6 Q. B. 578; 40 L. J. Q. B. 293. See *Bardwell v. Ames*, 22 Pick. 333.

owner has a right at common law to protect his land from damage from floods, and for that purpose to erect dams or other defences to divert the flood-water from its natural course. This right, however, is not an easement, and requires, therefore, merely this casual notice.*

Diversion
of flood-
water.

Somewhat analogous to the above case of flood-water, which at times inundates land, is the case of the sea which washes over the shore, and at times on to the adjoining ground; and as landowners are entitled to defend their property from injury by floods, so they may erect groynes or other defences to defend it from injury from the sea, and they are justified in diverting the flow of the sea, although in so doing they cause it to flow with greater violence on to the land of their neighbors to their damage. The reason for this is said to be that the sea is a common enemy to all owners of land on the coast, and that each landowner is justified in protecting himself, although the erection of defences may render it necessary for the adjoining landowners to do the like.[†] In the recent case of *Hudson v. Tabor*[‡] the question was raised whether a person who owns lands abutting on the sea-shore is, or can be, bound, either at common law or by prescription,

Diversion
of the flow
of the sea.

Obligation
to maintain
sea-walls.

* *Trafford v. Rex*, 8 Bing. 204; *Nield v. London and North Western Railway Company*, L. R. 10 Exch. 4; 44 L. J. Exch. 15. From these decisions it does not appear clear whether the landowner, who defends himself against floods, incurs liability to another person, if by his act the flood-water is thrown upon the other's land and does injury there. In *Trafford v. Rex*, Tindal, C. J., said the exercise of the right was subject to the restriction that the person exercising it did not thereby occasion injury to the lands or property of other persons; but in the case of *Nield v. The London and North Western Railway Company*, it was held that as the water was not brought into the canal by the defendants they were not liable for damage caused to a neighbor owing to their act of defence. The latter principle appears the more reasonable of the two, for the natural result of preventing water coming on one man's land is to force it to flow on to the land of another, when it is sure to be more or less prejudicial. How then can it be said that there is a right to defend one's own land, by forcing the water on to another person's ground, and yet there is no right to cause the injury which must necessarily follow?

[†] *Rex v. The Pagham Commissioners*, 8 B. & C. 355; *Rex v. Bognor Commissioners*, 6 L. J. K. B. 338.

[‡] 1 Q. B. D. 225; 45 L. J. Q. B. 190.

to keep up a sea-wall to prevent the sea flowing over his land and thence on to that of his neighbor to his damage. Numerous ancient authorities were cited to establish a common law liability to keep up the wall, but the court held that there was no such liability. It appears, however, that from a very early period the king, who by the prerogative of the crown had power to see to the defences of the realm, issued on more than one occasion commissions to inquire into the state of the sea-walls and other defences against the sea in particular districts, and where such sea walls or other works were found defective, was accustomed to order their repair and to make ordinances for their future maintenance, assessing to the expense of the work, not only the party to whom the land fronting the sea belonged, but all who derived benefit from the work; but it was held that even this did not show any common law liability on the adjoining landowner to maintain sea-walls for the safety of his neighbors, the evidence tending rather to show that he only became liable under the commission and royal ordinance. It was also attempted to show such a practice to maintain the sea walls, that a right in the case before the court had been acquired by prescription, that is, by long and uninterrupted usage, for the neighboring landowners to have the sea-wall kept up by the frontage owner; but though it was held that no such right had been acquired in that particular case, it was admitted by the court that there are cases in which an owner of land fronting the sea may be bound by prescription to maintain a bank or wall to keep out the sea water for the protection of the owner of the adjoining land, for that was abundantly shown by the authorities cited in the course of the argument.

An attempt was made to extend the principle of right to defend land from the sea, though the defences used
 Tidal rivers. may send the water on to other persons' land to their detriment, to the case of tidal rivers, on the ground that tidal rivers are branches or arms of the sea, and this was urged in order that a riparian owner who had erected works to protect his shore might be held irresponsible for injury to the opposite shore, produced by the change in the course of the stream.

The justification, however, was not allowed; for it was said that the greatest work of man is insignificant when compared with the power of the sea, but that this is not so with reference to a navigable river; and it was added that if the principle contended for were sustainable, it would follow that every riparian proprietor on a navigable river, however distant from the sea, and however gentle the flow of the tide at the place, might throw any works into the *alveus* that he might deem necessary for his protection, regardless of the injury such works might cause to the adjoining or opposite proprietor."

Among rights which have relation to the flow of water, the right which may be acquired by a land or mine owner to cause water, either from a natural or artificial source, to flow over the adjoining land of a neighbor, must be included. It is unnecessary to say more in this place than that such a right may exist, and that when created it is an easement. The acquisition of such an easement will not, however, impose an obligation upon the dominant owner to *continue* the supply of water for the benefit of the servient tenement; in other words, the servient owner does not, by the continued reception of the water on his land, acquire an easement against the dominant owner that the latter shall continue to supply him with the water in an unfailing stream."

Right to send water over land.

Regarding flowing water, and the easements and natural rights which may and do exist in such water, it will readily be seen that a great distinction exists between streams which flow on the surface of land, and water which percolates through the soil under the surface in unknown or undefined channels; for if the channels are *defined* and *known*, it makes no difference whether streams

Flow of underground water.

" Attorney General v. The Earl of Lonsdale, L. R. 7 Eq. 377; 38 L. J. Ch. 335; Bickett v. Morris L. R. 1 Sc. App. per Lord Chelmsford, C., at p. 56.

" Gaved v. Martyn, 34 L. J. C. P. at p. 363; 19 C. B. N. S. 732; Arkwright v. Gell, 5 M. & W. 203; 8 L. J. N. S. Exch. 201; Mason v. The Shrewsbury and Hereford Railway Company, L. R. 6 Q. B. 578; 40 L. J. Q. B. 293.

are under or above ground. It was not, however, till recent years that the distinction was settled in a court of law, for until the case of *Acton v. Blundell*,^x no question appears to have arisen on this point in the courts. That case was an action for diverting water which naturally percolated through the earth to certain wells used in connection with cotton factories by the sinking of coal pits, and it was then for the first time decided that the rules of law relating to the flow of surface water do not apply to underground streams, the course of which is unknown or undefined. The reasons for those rules, and the distinction which exists between surface and underground watercourses, was fully discussed and explained by Tindal, C. J., who delivered the judgment of the Court of Exchequer Chamber, and it may not be out of place to quote a portion of that judgment, which is deserving of special notice. The chief justice said: "The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious; that the enjoyment has been long continued (in ordinary cases, indeed, time out of mind) and uninterrupted, each man knowing what he receives, and what has always been received from the higher lands, and what he transmits, and what has always been transmitted to the lower. The rule, therefore, either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages; or perhaps it may be considered as a rule of positive law (which would seem to be the opinion of Fleta and of Blackstone), the origin of which is lost by the progress of time, or it may not be unfitly treated as laid down by Story, J., in his judgment in the case of *Tyler v. Wilkinson*,^y in the courts of the United States, as 'an incident to the land, and that whoever seeks to found an exclusive use must establish a rightful ap-

^x 12 M. & W. 324; 13 L. J. Exch. 289. See, also, *Chasemore v. Richards*, 7 H. L. C. 349; 29 L. J. Exch. 81; *Regina v. Metropolitan Board of Works*, 3 B. & S. 710; 32 L. J. Q. B. 105.

^y 4 Mason's (American) Reports, 401.

propriation in some manner known and admitted by the law.' But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighboring soil does not flow openly in the sight of the neighboring proprietor, but through the hidden veins of the earth beneath its surface. No man can tell what changes these underground sources have undergone in the progress of time. It may well be that it is only yesterday's date that they first took the course and direction which enabled them to supply the well. Again, no proprietor knows what portion of water is taken from beneath his own soil, how much he gives originally, or how much he transmits only, or how much he receives; on the contrary, until the well is sunk and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all. In the case, therefore, of the well, there can be no ground for implying any mutual consent or agreement for ages past between the owners of the several lands beneath which the underground springs may exist, which is one of the foundations on which the law as to running streams is supposed to be built; nor, for the same reason, can any trace of a positive law be inferred from long-continued acquiescence and submission, whilst the very existence of the underground springs, or of the well, may be unknown to the proprietors of the soil. But the difference between the two cases with respect to the consequences, if the same law is to be applied to both, is still more apparent. In the case of the running stream, the owner of the soil merely transmits the water over its surface; he receives as much from his neighbor above as he sends down to his neighbor below; he is neither better nor worse; the level of the water remains the same. But if the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbor from making any use of the spring in his own soil, which shall interfere with the enjoyment of the well. He has the power still further of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of

the soil ; and this by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbor. He may impose on such neighbor the necessity of bearing a heavy expense if the latter has erected machinery for the purposes of mining, and discovers when too late that the appropriation of the water has already been made. Further, the advantage on one side and the detriment to the other may bear no proportion. The well may be sunk to supply a cottage or a drinking-place for cattle, whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And lastly, there is no limit of space within which the claim of right to an underground spring can be confined ; in the present case the nearest coal-pit is at the distance of half a mile from the well ; it is obvious that the law must equally apply if there is an interval of many miles."

Water, unless confined in a vessel, is not the subject of property, but being provided by nature for the common benefit of mankind, every man has a right to use it for his own advantage as long as it remains upon or under his land ; if, from its natural unstable and wandering character, it escapes from the land of one person to that of another, the right of the former to the water is gone. If a man erects a tank and confines water therein, the water is his as long as it remains in the tank, but no longer ; and so if he digs a well ; the fact, however, of a man digging a well for the collection of water cannot impose any restriction upon neighboring landowners, disentitling them to use their land in any way they please. If, therefore, they think proper to dig a pit and excavate minerals, or to sink a well for their own use, they do no wrong in law to the owner of the first well, even though the water is made to escape therefrom and the well is drained, nor if the water is prevented percolating through the soil and finding its way to the well as it had previously been accustomed.^z

^z *Acton v. Blundell*, 12 M. & W. 324 ; 13 L. J. Exch. 289 ; *New River Company v. Johnson*, 29 L. J. M. C. 93 ; *Chasemore v. Richards*, 7 H. L. C. 349 ; 29 L. J. Exch. 81 ; *Race v. Ward*, 4 E. & B. 702 ; 24 L. J. Q. B. 153 ; *Ballacorkish Mining Company v. Dumbell*, L. R. 5 P. C. 49 ; 43 L. J. P. C. 19.

IN AMERICA,

Also, it is well settled that no action lies for cutting off underground water, soaking, or percolating through the soil in unknown and undefined channels, and the doctrine of *Acton v. Blundell* is, for the most part, followed and approved.¹ And even if one proprietor has collected such underground water into a well, the adjoining owner may also lawfully dig a well or otherwise excavate on his own land for useful purposes, although the effect be to entirely cut off the supply to the first well. Whether he would be liable if he did such act wantonly and maliciously, and without a *bonâ fide* intention of improving his own estate, is not so well agreed. Some hold that his right is absolute, without regard to motive, and that a man's motive cannot make an act illegal, which was not in itself wrongful.² On the other hand, so many respectable authorities incline, if not decide the other way, that it can hardly be considered as yet a settled question.³ And conversely no proprietor has an absolute right that such water shall continue to drain off or percolate through his neighbor's land as it has formerly done.⁴ A third view, maintained by some American courts, is, that a landowner has not an absolute and unqualified property in underground water, as he has in the sand and rock that form part of the soil, and so may do as he pleases with it, but that his rights therein are governed by the same general principles that regulate the use of water flowing on the surface in well defined streams or channels; that is, he may make a reason-

¹ See *Chatfield v. Wilson*, 28 Vt. 49; 31 Ib. 358; *Harwood v. Benton*, 32 Vt. 724; *Haldeman v. Bruckhardt*, 45 Penn. St. 521; *Wheatley v. Baugh*, 25 Penn. St. 528; *Trustees, &c., v. Youmans*, 50 Barb. 316; 45 N. Y. 362; *Bliss v. Greeley*, 45 N. Y. 671; *Chase v. Silverstone*, 62 Me. 175; *Frazier v. Brown*, 12 Ohio St. 294; *Ellis v. Duncan*, 21 Barb. 230.

² See *Chatfield v. Wilson*, 28 Vt. 49; *Phelps v. Nowlen*, 72 N. Y. 39; *Heald v. Casey*, 11 C. B. 993; *Clinton v. Myers*, 46 N. Y. 511.

³ See *Greenleaf v. Francis*, 18 Pick. 117; *Wheatley v. Baugh*, 25 Penn. St. 533; *Roath v. Driscoll*, 20 Conn. 533; *Chasemore v. Richards*, 5 H. & N. 990 (Am. ed.); *Trustees, &c. v. Youmans*, 50 Barb. 327.

⁴ See *Goodale v. Tuttle*, 29 N. Y. 466; *Mosier v. Caldwell*, 7 Nev. 363.

able use of it for domestic, agricultural, or manufacturing purposes, not however trenching upon the similar rights of others. And therefore the landowner may, in the reasonable use of his own land, obstruct or divert such underground water, by walls for cellars and other purposes, and may dig wells and use the water for domestic or agricultural purposes; or he may drain his land, or by obstructions for reasonable purposes obstruct the natural drainage of his neighbor through his land without being responsible for any damage thereby occasioned. To the Superior Court of New Hampshire belongs the distinction of first advancing, and still adhering to this doctrine, admitted to be somewhat at variance with *Acton v. Blundell*.¹

A case relating to the right to underground water was lately decided in the Court of Chancery, of a character to be noticed, inasmuch as the decision introduced a modification into the general rule that a landowner has full liberty to collect or dispose of underground water as he pleases, regardless of his neighbor's interests, if the water does not flow in a known and defined stream. In that case, the defendant, who represented a local board of health, made a drain to collect percolating underground water, and the effect was that surface water which flowed in a defined stream sunk into the earth, and the stream was diminished. It was decided that, though ordinarily a landowner has the right to act as the defendant had acted, yet that he had no right, even indirectly, to interfere with the surface stream, and an injunction was granted to restrain him from collecting the underground water in such a manner as to interfere with that on the surface. For the defence it was urged that there was no difference between a flowing stream on the surface of the land and water collected in a well, and that as the collection of underground water was justifiable, even though the water in a well was drawn off thereby, so it was justifiable though the water in the stream was lessened. It was decided, however, that that was not so, and it was said

¹ See *Barrett v. Salisbury Man. Co.* 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439. See, further, *Taylor v. Welch*, 6 Oreg. 198; *Buffum v. Harris*, 5 R. I. 243.

that the distinction was plain. "If," said Lord Hatherley, C., "you are simply using what you have a right to use, and leaving your neighbor to use the rest of the water as it flows on, you are entitled to do so; but you must not appropriate that which you have no right to appropriate to yourself. In this case there is *ex concessis*, a defined channel in which this water was flowing, and I think the evidence is clear that some of it is withdrawn by the drain which the local board have made. As far as regards the support of the water, all one can say is this: I do not think *Chasemore v. Richards*, or any other case, has decided more than this, that you have a right to all the water which you can draw from the different sources which may percolate underground; but that has no bearing at all on what you may do with regard to water which is in a defined channel, and which you are not to touch. If you cannot get at the underground water without touching the water in a defined surface channel, I think you cannot get at it at all. You are not by your operations, or by any act of yours, to diminish the water which runs in this defined channel, because that is not only for yourself, but for your neighbors also, who have a clear right to use it and have it come to them unimpaired in quality and undiminished in quantity."^a

2. The next kind of water-rights to be considered are those which have relation to purity of water.

It is a well established rule of law that every landowner has a natural right that the water of natural streams which passes over his land shall be suffered to continue in its natural state; that is, not only that it shall be uninterrupted in its course, but also that it shall be suffered to continue in its naturally pure condition. This principle has been supported in many decisions of late years, but the leading case on the point is *Wood v. Waud*.^b The action in that case was brought against the defendants, who were worsted-spinners and wool-combers at Bradford, for

^a *Grand Junction Canal Company v. Shugar*, L. R. 6 Ch. App. 483.

^b 3 Exch. 748; 18 L. J. Exch. 305. And the law is so established in America. *Merrifield v. Lombard*, 13 Allen, 16; *Dwight Printing Co. v. Boston*, 122 Mass. 583; *McCallum v. Germantown Water Co.* 54 Penn. St. 40.

having in the course of their business poured soapsuds, wool-combers' suds, and other refuse matter into a natural stream, the water of which flowed from their premises to the plaintiff's mills. It was proved that many other manufacturers poured filthy matter into the stream, and that the Bradford sewers also discharged themselves into the same place, so that the damage actually caused by the defendants was imperceptible; but it was held that the plaintiffs had received damage in point of law, for they had a right to the natural stream flowing through their land in its natural state as an incident to the property in the land through which the watercourse flowed, and that the right continued notwithstanding the pollution from other sources.

There is no difference with regard to the natural right to purity of water between the cases of water flowing openly on the surface of land in a defined channel and water trickling over the ground without any defined course, or water percolating through the soil in unknown or undefined streams. In each case the landowner has a natural right that the water shall not be polluted. The principal case on this point is *Hodgkinson v. Ennor*,^c in which it was urged that the principle of law relating to diversion or obstruction of underground water flowing in unknown or undefined streams, established in the case of *Chasemore v. Richard*,^d applied equally to pollution of such water; but it was held not to be so, for that although the person polluting the water might have a right to use it in any way he thought proper, as for washing lead, still that the maxim *sic utere tuo ut alienum non lædas* applied to the case, and that he could use the water only in such a manner as to avoid causing damage to his neighbor.

As, then, all landowners have this natural right to purity of the water of streams, whether above or underground, so other persons may obtain adverse rights or easements entitling them to pollute the water. There are many instances to be found in the Reports of the

Purity of water trickling over land or percolating through the soil.

Rights to pollute water.

^c 4 B. & S. 229; 32 L. J. Q. B. 231.

^d 7 H. L. C. 349; 29 L. J. Exch. 81.

acquisition of rights of this kind, but it is unnecessary to refer to them with particularity in this place.^e

3. The last class of easements to which a landowner may become entitled in connection with water are rights to take water from the soil of other persons for use. The right to take water for use. It will be remembered that in explaining the nature of an easement and the definition laid down in the early part of this chapter, it was shown that a right to take water in the land of another person is an easement, and not a *profit à prendre*; and the reason for this was explained to be that water is not a part or the produce of the soil, nor the property of the owner of the land over which it flows or on which it stands.^f

There are two modes of making use of water. To one mode — that of using it as it flows to turn a mill — reference has already been made; to the other — namely, that of taking it for consumption — attention is now directed. To take water for this purpose is another of the natural rights to which every owner of land on the margin of a natural stream is entitled by law in respect of his riparian land; thus it is said: “The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it; that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. See 5 B. & Ad. 24. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it.”^g

^e Wood v. Waud, 3 Exch. 748; 18 L. J. Exch. 305; Wright v. Williams, 1 M. & W. 77; 5 L. J. N. S. Exch. 107; Rameshur v. Koonj, 4 App. Cas. 121 (1879), an interesting case on this point.

^f Ante, p. 7. See Post v. Pearsall, 22 Wend. 425; Huff v. McCauley, 53 Penn. St. 210; Hill v. Lord, 48 Me. 99.

^g Embrey v. Owen, 6 Exch. at p. 369; 20 L. J. Exch. 216.

It may at first sight appear to be a contradiction to say that
 Limit of natural right to use and consume water. one riparian owner is entitled to the uninterrupted flow of the water of a stream, and that another riparian owner who has land higher up the stream may consume the water before it flows down to the land of the former ; but it will be shown hereafter,^a when the extent and mode of user of easements is examined, that these rights to the uninterrupted flow of streams and to consume the water are limited in their extent by one another, and that it is neither the right of one riparian owner that the stream shall flow in an absolutely unaltered state, nor the right of the other to use and consume any quantity of the water that suits his purpose.

Water may be taken for use either when it is stationary in
 Nature of the right to take water. a well or pond, or when it is flowing in a stream. A natural right to take water for use exists only while it stands on or flows over the land of the person who takes it ; but it will be seen that there is a difference between the natural right to take water while it is standing on the land of the taker, and the natural right to take water while it is flowing towards the land of another person ; in the former case the right is the natural proprietary right incident to the ownership of the land to take the water while it remains there, just as the owner might take stones, earth, or anything growing — it is not a natural easement or right exercised adversely to the interest of another person. But the natural right to take water while it is flowing towards another person's land is more than a proprietary right — it is a natural easement exercised adversely to the interest of another person who is deprived by the exercise of the right of the enjoyment of the water which would otherwise have passed to him. It is of the latter kind of natural right to use water that it is purposed to treat in this volume.

If water be standing or flowing on the land of another person, a right to take that water for use on the premises of the person taking it is in no case a natural right, but an easement. This distinction is very marked in the case of *Crossley &*

^a See *post*, chapter III.

Sons (Limited) *v.* Lightowler,¹ which was a suit for an injunction to restrain the defendants from polluting a running stream. In the judgment it was said by the lord chancellor (Lord Chelmsford): "From what has been already said it may be collected that in my opinion, if the plaintiffs had proved the pollution of the Hebble *opposite to their mills* by the defendants, they would have had good ground for an injunction, although they were not actually using the water for their business. But although the plaintiffs, by their bill, assert their rights as *riparian proprietors*, the case which they prove is of an entirely different description." It appeared from the evidence that the plaintiffs, in order to obtain a supply of pure water for their mills (the Dean Clough Mills), which were situated on the banks of the Hebble, had obtained a right to lay a pipe from their mills to a point on the stream above the mouth of a foul water pipe from some dye-works belonging to Messrs. Pilling, by which means they were enabled to convey the water to their mills before it became polluted by the foul water from the dye-works. The lord chancellor continued: "Whether the agreement with the Messrs. Pilling, however binding upon them, would enable the plaintiffs to assert the right acquired under it in their own names against any persons fouling the water thus artificially obtained, is perhaps doubtful; but the plaintiffs do not claim as the grantees of Pilling, *but in their character of riparian proprietors*, and the fouling which they prove is not of the water which flows between the banks at Dean Clough, but of the supply which they draw to the mills through pipes from a higher source." " *This is clearly not an injury to the rights of the plaintiffs as riparian proprietors.*"

Instances of rights to take water are very common and within every person's experience; cases of right to go to a neighbor's pond to water cattle, or to his well to draw water for household use, or to run pipes through his land to a well or flowing stream to obtain water for manufacturing purposes, and similar cases innumerable, are frequently met with, and it is needless to cite authorities to show that these are easements.

¹ L. R. 2 Ch. App. 478; 36 L. J. Ch. 584.

WAYS.

The next class of easements to be noticed is rights of way ; that is, rights which landowners may have of passing over the soil of other persons for the purpose of going to or from their own estates.

A right of way imports, *ex vi termini*, a right of passing over another's land in some particular line, and a right to pass over in any direction and at any place wherever most convenient for the party claiming such way, cannot be acquired by prescription.¹

It may be remarked that this class of easements differs from all those which have hitherto been noticed in that there are no rights of this class which fall under the denomination of natural rights. Rights of way are never given by *law* to owners of land, a circumstance which was stated at the commencement of this chapter to be a characteristic of natural rights, but they arise in every case from *the act of man* ; that is, by means of a grant either express or implied, as will be more fully explained hereafter.

Of rights of way there are two kinds, public and private. Public rights of way are rights of passage which every individual is entitled to enjoy for the purpose of passing from one locality to another ; while private rights of way are rights which belong to a particular individual only or to a body of individuals, either for the purpose of passing generally, or for the purpose of passing from a particular tenement of which they are possessed. Public rights of way are rights which all persons in the kingdom are entitled to use at their free will and pleasure, irrespectively of any estate of which they happen to be owners, and even though they are possessed of no estates whatever. Hence it follows that public rights of way are rights *in gross* and not easements, for it has been explained that rights in gross are not easements, it being an essential characteristic of easements that they are enjoyed in respect of a dominant tenement.

¹ Jones v. Percival, 5 Pick. 484. See Jennison v. Walker, 11 Gray, 426.

For a similar reason, private rights of way, not appurtenant to a dominant tenement, are not in England considered easements, but rights in gross.^j

The existence of a right of way over land, and indeed, of any other easement, necessarily operates as a restriction upon the landowner's rights in the soil and his freedom of user; but the extent of the restriction Effect as regards the owner of the soil. is frequently a matter of great importance, as upon that depends the mode in which the landowner is entitled to use his own ground; and to understand rightly how far a right of way operates as restriction upon the user of the land, it is necessary to understand the precise nature of a right of way. For this purpose, there is no difference in principle between a public and a private right of way; in either case it is a mere right of passing over the soil of another person uninterruptedly, though in the one case the right is for every individual to pass while in the other it is for a particular person only. The right is not a right *to the land*, nor to any corporeal interest in the land, and the soil is in no way the property of the owner of the right. From this it follows that as long as the owner of the right of way is not prevented enjoying his easement, he has no right to prevent the landowner doing anything he pleases with the soil.¹ In the case of *The Vestry of St. Mary, Newington, v. Jacobs*,^k the question arose with reference to a public right of way, but the principle involved in the case is equally applicable to a private right. The respondent was owner of freehold premises abutting upon the footway by the side of the street, and the footway was paved with flag stones. To reach his premises the respondent was obliged to cross the flagged footway and by conveying heavy machinery over it broke up the stones; the vestry would not allow him to take up the flag stones and pave the footway differently before his gate, but contended that as the footway

^j *Ackroyd v. Smith*, 10 C. B. 164; 19 L. J. C. P. 315; *Rangely v. Midland Railway Company*, L. R. 3 Ch. App. per Lord Cairns, L. J., at p. 310; 37 L. J. Ch. 313; *Thorpe v. Brumfitt*, L. R. 8 Ch. App. 650.

¹ See *Perley v. Chandler*, 6 Mass. 454; *Adams v. Emerson*, 6 Pick. 57.

^k L. R. 7 Q. B. 47; 41 L. J. M. C. 72; *Rex v. Jolliffe*, 2 T. R. 90.

was dedicated to the public as a footway it could not be used by the respondent, though he was admitted to be owner of the soil, for any purpose other than a footway, as, for instance, the passage of machinery. It was decided, however, that his user was lawful, and the principles upon which the respective rights of the public and the owner of the soil of the highway depended and the nature of a right of way were explained by the court. The right of the respondent, it was said, depended upon the nature and extent of the rights acquired by the public over the footway in question, either at common law or under the Highway Acts, or the Metropolis Local Management Act. With these acts it is not necessary to deal in this treatise, but as regards the common law it was continued: "The owner who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership, not inconsistent therewith; and the appropriation made to and adopted by the public of a part of the street to one kind of passage, and another part to another, does not deprive him of any rights as owner of the land which are not inconsistent with the right of passage by the public. If this were not so, the owner of a large estate having dedicated a portion of his land to the use of the public as a roadway, and they or the persons representing them, having raised a footpath on one side of such roadway, for their own more convenient use thereof, would after a lapse of time, be so bound by this convenient arrangement of such roadway as to be unable to open a new gateway or entrance to his land from such roadway without being liable to be convicted under the provision of the Highway Acts. If this were really the law, the result would be most serious to owners who have dedicated or may dedicate roadways to the public; and in towns would to a great extent prevent the owners of houses and buildings from changing their character and use to any purpose of business, which could not be accomplished without the use of a horse, or cart, or carriage. That such is not the law appears to us to be the result both of principle and authority; and we think that the provisions of the Highway

Acts and the Metropolis Local Management Act, so far as they apply to roads or streets, are subordinate to the paramount rights reserved by the owner. We do not deny that the owner cannot derogate from the grant of the roadway made by him to the public, and cannot do anything that will really and substantially interfere with the right of passage by the public."

Although public rights of way are not easements, several or many persons may have rights of way over one and the same road which are easements — as, for instance, in the case of a collection of houses with one private road leading to them over which all the occupants have a right to pass; for there can be no doubt that as those rights exist in respect of the houses, they are easements, though possessed by more persons than one. An instance of a private way shared between several persons may be found in the case of *Semple v. The London and Birmingham Railway Company*,¹ in which a road is mentioned leading to several wharves which the lessees of the wharves had covenanted jointly to keep in repair; it was held that the road was private, not public, and there can be no doubt that the rights of way belonging to the owners of the wharves were easements.

Coexisting rights of way.

It has been argued that a public and private right of way over the same soil cannot coexist, for that if a public right of way exists, any user of a passage over that soil by an individual must be in exercise of his right as one of the public, and that a preëxisting private right of way is merged and extinguished if a public right is created over the same soil as the private way. To some extent this is true, for there can be no doubt that if a public right of way over a road exists, no private right can be subsequently acquired over the same spot,^m and under certain circumstances, undoubtedly a private right may be merged in a subsequently created public right.ⁿ It is, however, equally

Public way over preëxisting private way.

¹ 9 Sim. 209. See, also, in *Duncan v. Louch*, 6 Q. B. 904; 14 L. J. Q. B. 185.

^m *Regina v. Chorley*, 12 Q. B. 515. See *Nash v. Peden*, 1 Speers, 22.

ⁿ *Regina v. Chorley*, 12 Q. B. 515; *Chichester v. Lethbridge*, Willes, 71.

clear that if a person has a private right of way, his right is not necessarily and in every case extinguished if the public gains a right to use the same road, and the owner of the private right may at any time assert and rely upon that right to justify his user of the way without resorting to the public right; the power to do so may indeed be of great importance to him, for the public right may be disputed, or it may possibly, for other reasons, not form a justification for an act for which he is sued.^o

Reference has already been made to easements of necessity, as being easements to which an owner of land generally becomes entitled if his land is so situated that, but for the right to the easement, it would be inaccessible and worthless. The most common easements of this class are ways of necessity, which are rights given to the owner of land to pass over the land of his neighbor if he has no other means of access to his own soil. It will be seen when the mode of acquisition of these rights is discussed,^p that it is not in every

^o *Allen v. Ormond*, 8 East, 3; *Regina v. Chorley*, 12 Q. B. 515; *Duncan v. Louch*, 6 Q. B. 915; *Brownlow v. Tomlinson*, 1 M. & G. per Lord Denman, C. J., at nisi prius, at p. 486. Questions as to liability to repair have occasionally arisen through public ways having been acquired over private roads. Thus in *Reg. v. The Inhabitants of Bradfield*, L. R. 9 Q. B. 552; 43 L. J. M. C. 155, a public right had by user been gained over a private way set out under an old inclosure award, whereby it was expressly provided that the road should at all times, and forever thereafter, be repaired and kept in repair by the owners' or occupiers for the time being of the land next adjoining the road, and the question was, who was to do the repairs, the parish, or the persons named in the award. It was decided the parish was liable; for that though the fact that the road was originally set out under the award, as a private road to be used and repaired by particular individuals, was inconsistent with its then being a highway, yet there was nothing to prevent the owners of the soil from dedicating the road to the public, so as to make it a public highway, and that the rule of the common law is that when once a road becomes a public highway the parish or township must repair it. It may be remarked that in this case it must have been assumed that the private easement was not extinguished by or merged in the public right of way, for if it had been it could not have been contended that the liability of the owners or occupiers of the adjoining land to repair under the award remained.

^p See *post*, chapter II. title WAYS.

possible case of inaccessibility that a way of necessity is given to the owner of land, and it will also appear over whose land and in what direction ^a a way of necessity may be acquired, but it would be out of place to inquire into these points now.

But one point remains to be mentioned with regard to the nature of rights of way — that is, they may be general in their character, or, in other words, usable for all purposes, or they may be limited to particular purposes. Thus a right of way may be limited for agricultural purposes only, and the existence of such a right is not of itself sufficient evidence of a general right for all purposes — as to carry lime or stone from a newly-opened quarry,^r or it may be limited for the purpose of driving cattle or carriages, or it may be a horse-way, or merely a way for foot passengers,^s but the extent of the right must always depend upon the words of the instrument creating the right, if any written instrument exists; or it must be measured by the accustomed user, if the right has been gained by prescription.^t

Rights of way, general or limited.

MISCELLANEOUS RIGHTS.

Besides the above-mentioned easements which a landowner may lawfully acquire in connection with the air, the light, and water, and the rights to support and ways, respecting which special principles of law have sprung up, either from statutory enactment or from custom, attempts have been made to establish other easements which the law will not recognize, and to annex them to land. Without wishing to lay down that there can be no other easements than those above-mentioned, it was pointed out in the first section of this chapter that the law will not permit a landowner to create easements of a novel character

Attempts to create new species of easements.

^a See *post*, chapters II. and III. title WAYS.

^r *Jackson v. Stacey*, Holt N. P. 455.

^s *Ballard v. Dyson*, 1 Taunt. 279; *Ardley v. St. Pancras Guardians*, 39 L. J. Ch. 871 (not elsewhere reported). See *Tyler v. Sturdy*, 108 Mass. 196.

^t See *post*, chapter III. title WAYS.

and annex them to the soil; and that though any such right which he may confer upon another person may be valid and obligatory upon him personally so long as he continues owner of the quasi-servient tenement, so that on disturbance he may be sued for breach of covenant, yet that those rights are void as against other persons than the grantor, and will not entitle the grantee to sue in his own name for any disturbance of his right.²

Still there are some other well known easements, or rights so similar as generally to be called easements; and the following have been considered easements, namely, a right of piling articles of merchandise in boxes, bales, &c., on another's land, and of drawing them into a store by a windlass over the way; for swinging shutters over the same, and for other similar purposes; ¹ a right to use land as a mill-yard.²

So an easement or right of eaves-drip may be acquired in the land of another, by grant or prescription; ³ and it is always a question of fact for the jury whether the use was permissive or adverse.⁴ But even if an easement or right of drip is thus created by prescription, this does not of itself

² *Ante*, p. 21. The following rights appear to have been treated as easements: A right to fasten clothes lines and dry linen. *Drewell v. Towler*, 3 B. & Ad. 735. A right to nail trees to a wall. *Hawkins v. Wallis*, 2 Wils. K. B. 173. A right to use another's chimney for conveyance of smoke. *Hervey v. Smith*, 22 Beav. 299; 1 Kay & J. 389. A right to have a public-house sign-post on a common opposite the house. *Hoare v. The Metropolitan Board of Works*, L. R. 9 Q. B. 296; 43 L. J. M. C. 65. A right of eaves dropping on to a neighbor's land. *Harvey v. Walters*, L. R. 8 C. P. 162; 42 L. J. C. P. 105. A right to tether horses. *Johnson v. Thoroughgood*, Hob. 64. The latter right may have been a species of right of common, for obtaining pasturage was the object of the privilege. See, also, *Underwood v. Burrows*, 7 C. & P. 26. An easement to have a hatch in another man's soil. *Wood v. Hewett*, 8 Q. B. 913. A right to maintain a sign-board on another person's house. *Moody v. Stegless*, 41 Law T. Rep. 25 (1879), a very recent and valuable case.

¹ *Richardson v. Pond*, 15 Gray, 387, as stated in 2 Allen, 577.

² *Gurney v. Ford*, 2 Allen, 576.

³ *Smith v. Smith*, 110 Mass. 304; *Harvey v. Walters*, L. R. 8 C. P. 162; *Neale v. Seeley*, 47 Barb. 316.

⁴ *Carbrey v. Willis*, 7 Allen, 364; *Randall v. Sanderson*, 111 Mass. 119.

give the claimant a right to the *land itself* under the eaves, or prevent the landowner from building on the land, if he can do so without interfering with the eaves.¹

The interest of the separate owners of pews in a church or meeting-house, the fee of which and of the soil is in the society or corporation, is usually also termed an easement.²

One of two adjoining landowners may by prescription or contract acquire a right or easement in the other's land, that the owner thereof shall alone maintain the division fence between them.³

The right acquired by a chartered gas company to lay pipes in the public streets is an easement, and not a mere license.⁴

One of the principal of these rights which was asserted in connection with land at a very early period, but which the law would not sanction, is the right that the prospect or view should not be impeded by the erection of buildings. The legal possibility of a right to undisturbed prospect was discussed in Aldred's case,^v which is one of the oldest recorded, and in which the point was raised. It was in that case laid down as law by Wray, C. J., "That for stopping as well of the wholesome air as of light, an action lies, and damages shall be recovered for them, for *both are necessary*," . . . but "that for prospect which is a *matter only of delight, and not of necessity*, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect." . . . "But the law don't give an action for such things of delight." A more recent case on the subject is *The Attorney General at the relation of*

Uninter-
rupted
prospect.

¹ *Keats v. Hugo*, 115 Mass. 204.

² *First Baptist Society v. Grant*, 59 Me. 245; *Union House v. Rowell*, 66 Me. 400; *Hinde v. Chorlton*, L. R. 2 C. P. 104.

³ See *Rust v. Low*, 6 Mass. 90; *Barber v. Whitely*, 34 L. J. N. S. Q. B. 212; *Adams v. Van Alstyne*, 25 N. Y. 237; *Heath v. Ricker*, 2 Me. 72. That the covenant of a grantor to keep up fences between his remaining land and the land granted, may run with the land, and bind his grantee, see *Bronson v. Coffin*, 118 Mass. 156; *Easter v. Little Miami Railroad*, 14 Ohio St. 48, where the subject is carefully considered.

⁴ *Providence Gas Co. v. Thurber*, 2 R. I. 15. See *Harback v. Boston*, 10 Cush. 295.

^v 9 Coke's Rep. 58.

Gray's Inn Society *v.* Doughty,^w in which a motion was made in the Court of Chancery before answer, to stop proceeding with the erection of certain buildings which would have the effect of intercepting the prospect from Gray's Inn Gardens. The interference of the court was asked on the ground of disturbance of what was alleged to be a right to the prospect, claimed by reason of long enjoyment, and it was said that the right had been previously admitted by parties interested in disputing it, and by a court of equity. The admission by the court of equity appeared to have been by Lord Jefferies, who had made several orders on petition to restrain building so as to intercept this prospect; but the lord chancellor (Lord Hardwicke) refused to interfere in a summary way, saying that he knew of no general rule of common law which warrants or says that building so as to stop another's prospect is a nuisance; for if such building had been a nuisance there could be no great towns, and he must grant injunctions to restrain all new buildings in London. As for the orders of Lord Jefferies, his lordship disposed of them in a very summary way by stating that that learned judge was too apt to do things in an extraordinary manner, and that they were made on petition without a bill filed, and he therefore laid them out of the case; but he added that such a right might be conferred by agreement. The question whether a right to undisturbed prospect could be conferred by agreement was not before Lord Hardwicke, when he delivered this judgment, and it is thought that if it had been, he would not, after due deliberation, have laid down that such a right could even be conferred by agreement or grant, so as to create an easement, and annex it to the land forever. An agreement not to obstruct the prospect is undoubtedly binding upon the parties to the agreement; cases in which owners of land bind themselves by covenant not to build on the land, or to build in a particular manner only, for the benefit of adjoining houses, are of frequent occurrence, and men may enter into such covenants just as they may bind themselves not to carry on a par-

^w 2 Ves. Sr. 453. See, also, *Wells v. Ody*, 7 C. & P. 410, and *Knowles v. Richardson*, 1 Mod. 55.

ticular trade. Covenants of this kind are made, either with a view to maintaining uniformity in a row of houses, or of preventing injury by spoiling the prospect from the windows, and in many instances these covenants run with the land ; but it is clear no easements are thereby conferred. One test of the correctness of this view is, that if the prospect is interrupted in defiance of the covenant, no action can be maintained for a tortious injury to a legal right, but the action must be brought for breach of the covenant.^x

In America this point arose in the recent case of *Jenks v. Williams*,¹ in which the defendant constructed a bow window on the front of his house on Mt. Vernon Street, Boston, projecting more than one foot, in violation of St. 1799, c. 31, and a city ordinance of Boston ; and the adjoining owner brought a bill in equity for an injunction on the sole ground that it would obstruct the view from the plaintiff's windows, and diminish the light and air entering therein ; but the injunction was refused on the ground that the statute and city ordinance were intended solely for the benefit of the public, and gave no private right of action to any individual, and as the plaintiff did not claim any grant of or agreement for an unobstructed view, a court of equity would not interfere, unless the injury amounted to a nuisance, which was not claimed.

But it is well settled in America, also, that such a right to uninterrupted prospect may be acquired by grant or reservation thereof. A grant of land, with a clause therein that no building shall be erected upon it, or only in a certain position, creates an easement therein, or a servitude in the nature of an easement ; either in favor of the grantor personally, or as appurtenant to his remaining land ; and the relative situation of the land granted, with reference to that retained, may

^x *Western v. M'Dermott*, L. R. 2 Ch. 72 ; 35 L. J. Ch. 190 ; *Lord Manners v. Johnson*, 1 Ch. D. 673 ; 45 L. J. Ch. 404 ; *Tulk v. Moxhay*, 2 Ph. 774 ; *Coles v. Sims*, 5 De G., M. & G. 1 ; 23 L. J. Ch. 258 ; *Piggott v. Stratton*, Johns. 341 ; 29 L. J. Ch. 1 ; 1 De G., F. & J. 33.

¹ 115 Mass. 217 (1874), citing also *Butt v. Imperial Gas. Co.* L. R. 2 Ch. App. 158.

be taken into consideration in determining this latter question;¹ which right may be protected by a bill in equity against the grantee.²

Somewhat analogous to a view *from* a house is a view *of* a house gained by persons approaching along a road. View of a shop-window. In cases of shops and places of business, it is frequently a matter of considerable moment to the shop-keeper that people shall catch sight of the shop window, or of an advertising board, as they walk along the road, and this circumstance has given rise to several lawsuits, when the view has been obstructed by the owner of premises adjoining a shop. The courts, however, will not recognize a right of this kind. In the case of *Smith v. Owen*,³ the plaintiff was owner of a shop in Bond Street, and the defendant, who was owner of the adjoining premises, began to make alterations which it was anticipated would have the effect of preventing the shop of the plaintiff being seen so far down the street as usual. Sir W. Page Wood, V. C., refused to interfere on this ground, for he said that all that could be complained of was that persons could not see the goods so soon as they might if the alterations objected to had not been made; that when they came in front of the shop the goods would be seen just as well as before. So, he added, if a sign were hung up in front of a shop, such as pawnbrokers' balls, which could be seen for a long distance, there was nothing to prevent a neighbor building on his own ground in such a way as to obstruct the distant view of such a sign.

There is a *nisi prius* decision, however, which is at variance with the above principle, and which seems to have been overlooked, or, at all events, has not been cited in the courts during the hearing of the recent cases. In the case of *Riviere v.*

¹ *Peck v. Conway*, 119 Mass. 546. See *Hubbell v. Warren*, 8 Allen, 173; *Badger v. Boardman*, 16 Gray, 559.

² *Whitney v. Union Railway Co.* 11 Gray, 359; *Parker v. Nightingale*, 6 Allen, 341; *Winfield v. Henning*, 6 C. E. Green, 190; *Brewer v. Marshall*, 4 Ib. 543.

³ 35 L. J. Ch. 317 (not elsewhere reported). See, also, *Butt v. Imperial Gas Company*, L. R. 2 Ch. App. 158. 165 Eng. R. 698

Bower,^{*} the plaintiff was proprietor of a house in Oxford Street, which he divided into two tenements, one of which he retained in his own occupation, and used as a gunsmith's shop, and that shop had a window projecting, by means of which his goods could be displayed by a side view to passengers going up and down the street. After the window had been constructed the plaintiff let the adjoining tenement to the defendant who was a bookseller and stationer. The defendant was in the habit of fixing to his door-post a movable case containing books which came close to the plaintiff's window, and had the effect of entirely obstructing the view of the goods on one side of the window. Although it was urged that as no action would lie for the obstruction of a prospect, so no action would lie for the obstruction of the shop window from the view of persons approaching, yet Abbott, C. J., held that the action was maintainable against the defendant, who held as tenant, as the window, although of recent construction, existed at the time of the demise; and this was so determined, although no stipulation was made at the commencement of the tenancy. This decision was evidently given on the ground that, as the window existed at the time of the demise, a grant of right to unobstructed view, or a covenant by the tenant that he would not obstruct, was to be implied, in the same way as it had been held in some old cases that, if the owner of a house sold the adjoining land, the purchaser could not build and obstruct his light; but it will be seen hereafter that, though there is some conflict of authority on the point, the law is now settled that the vendor of the land would have no right to light for his house reserved by implied grant in the absence of express stipulation; for the same reason, no grant or covenant would now be implied in a case similar to that above mentioned, by which the bookseller would be restrained from obstructing the gunsmith's window. From the analogous case of a grant of right to light being implied against a lessor if he lets a house reserving the adjoining land, it may still be argued that a right to unobstructed view by the public is impliedly granted if the owner of the house lets

^{*} Ry. & Moo. 24. See, also, *Brumraell v. Wharin*, 12 Grant's Ch. R. 283.

it with an existing shop window of which the public can obtain a view while approaching along the street.

Another right to which a claim has been made, but which is not recognized by the law, is a right to undisturbed privacy. There can be no dispute now that such a right is not recognized by law, although an attempt has been made to establish an easement of that kind. On this point Kindersley, V. C., said: "With regard to the question of privacy, no doubt the owner of a house would prefer that a neighbor should not have the right of looking into his windows or yard; but neither this court, nor a court of law, will interfere on the mere ground of invasion of privacy; and a party has a right even to open new windows, although he is thereby enabled to overlook his neighbor's premises, and so interfering, perhaps, with his comfort."^a So, again, in an old case of *Chandler v. Thompson*,^b it was said by Le Blanc, J., at nisi prius, that although an action for opening a window to disturb the plaintiff's privacy was to be read of in the books, he had never known such an action maintained, and when he was in the Common Pleas he had heard it laid down by Eyre, C. J., that such an action did not lie, and that the only remedy was to build on the adjoining land opposite to the offensive window. Where, however, there was a covenant not to build beyond a certain line, and the covenantor built some bay windows which projected beyond that line, and by means of them the covenantee's privacy was disturbed, Hall, V. C., when granting an injunction to prevent the continuance of the windows on the ground that the covenant was broken, said: "But if it had been necessary for me, in determining this case, to rest my judgment upon the question whether or not there was damage to the plaintiff arising from the erection of these windows, I should upon the balance of evidence come to the conclusion that there was. It is then said that these houses are more

^a *Turner v. Spooner*, 30 L. J. Ch. at p. 803; 1 Dr. & Sm. 467.

^b 3 Camp. 80. Interruption of privacy was expressly held not to confer a right of action in *Re Penny and the South Eastern Railway Company*, 7 E. & B. 660; 26 L. J. Q. B. 225.

ornamental than the others. However that may be, I think being partially overlooked from the first floor rooms, even at such a distance, particularly with reference to the house No. 2, is enough materially to detract from the value of the plaintiff's house. It is said there is no covenant as to privacy; but privacy will be interfered with, and there is a covenant that the act shall not be done, the doing of which causes the invasion of privacy, and there is accordingly damage and injury in respect of which relief ought to be granted." ^c

^c Lord Manners *v.* Johnson, 1 Ch. D. at p. 680.

CHAPTER II.

ON ACQUISITION OF EASEMENTS.

HAVING in the previous chapter explained the nature of, and the distinction between, Easements and Natural Rights, both with reference to those characteristics which are common to all, as well as those which are peculiar to particular kinds of easements, it is proposed in the present chapter to inquire into the different modes by which easements may be created and acquired, and, following the same order as before, first to consider the several modes of acquisition as they relate to easements generally, and afterwards the principles of law which relate to the modes of acquiring easements of particular classes.

SECT. 1. — *On Acquisition of Easements generally.*

In considering the acquisition of easements, a material effect of the distinction between Easements and Natural Rights is to be noticed. Easements can be created and acquired only by the act of man, whereas Natural Rights are incident to land, and to them the owner of land has as much right as he has to the land itself, without the direct intervention of human agency — that is, without any act of creation and gift by the servient owner, and without any act of acquisition on his own part. It is quite true that the act by which particular easements are created and acquired in many cases never actually takes place, but is merely implied; it will be seen, however, that an act of creation is never implied unless there is some reason manifest from the action of the parties, or from surrounding circumstances, why such an act should be implied, and why it should be supposed that the act really occurred,

Distinction
between
easements
and nat-
ural rights.

although no evidence of its occurrence actually exists. Thus, easements may be created by grant, but under certain circumstances a grant of the right will be implied, although no trace of the making of such a grant can actually be shown; while, on the other hand, no grant can be implied, unless such an implication is rendered reasonable by surrounding circumstances, or the acts of the parties.

For all practical purposes, there are five modes by which Easements, as distinguished from Natural Rights, may be acquired; they are—1. Under a grant; 2. By virtue of an act of parliament; 3. Under a devise; 4. By prescription; 5. Under a custom.

Modes of
creation
and acqui-
sition of
easements.

Theoretically, it is a question whether all these modes of acquisition are not identical, that is, whether the acquisition does not in each case take effect from a grant by the servient owner, either express or implied; and in support of this theory it is to be remarked that Lord Cairns, L. J., in speaking of the power supposed by a railway company to have been given them by act of parliament to set out a footpath over land they did not possess, said: “I will assume, in the first place, that that is a correct expression, and that the object is to create what is properly termed an easement over the land; but assuming that to be so, it appears clear that to create an easement over land you must possess the ownership of the land. *Every easement has its origin in a grant express or implied. The person who can make that grant must be the owner of the land.* A railway company cannot grant an easement over the land of another person. They may grant an easement as soon as they become proprietors of the land, but not until they become such proprietors. They must own the servient tenement in order to give an easement over the servient tenement.” Even though, therefore, a right of way or other easement were conferred under the provisions of an act of parliament, it is questionable whether it is not in the eye of the law created and given by an implied grant by the servient owner. So, again, in the case of an easement claimable

^a *Rangleley v. Midland Railway Company*, L. R. 3 Ch. App. at p. 310; 37 L. J. Ch. 313.

under a custom, the question may be asked whether the easement is not, in point of law, deemed to have been conferred by presumed grant by the servient owner, to which grant the dominant owner is legally entitled under the custom. It is mentioned in the case of *Gaved v. Martyn*^b that tin-streamers in Cornwall have, by the custom of the county, a right to the free use of the water over the whole of the district within their tin-bounds, and that they claim the right not only to use the water, but to divert it into other streams. These rights are undoubtedly easements, and they are claimed under a custom. In the case of *Ivimy v. Stocker*,^c these rights were again under consideration of the courts, and they were not there alleged to be customary rights, but, on the other hand, they were decided to be rights created by implied grant, such grant being presumed after long enjoyment to have been made by the owner of the adjoining land to the owner of the ground under which the mine was excavated.

These instances render it somewhat doubtful whether easements can be created and acquired otherwise than by grant express or implied, for it will be shown that in the remaining case, of acquisition by prescription, a grant is always implied, and that a devise by will is, in fact, an actual grant. But as this is mere theory, and, it is conceived, of no practical value, easements will be treated in this work as capable of creation and acquisition by five distinct means, and it may be taken as a fact, that in whatever manner an easement may be called into existence the right is essentially the same, as well as the legal incidents belonging to it.^d

Easements, being incorporeal rights, follow the rule which is binding in all other cases of incorporeal rights, and can be created only by deed — that is, by deed actually executed, or presumed to have been executed. Easements cannot be created by parol,¹ or

Easements
must be
created by
deed, actual or
presumed.

^b 34 L. J. C. P. at p. 354; 19 C. B. N. S. 732.

^c L. R. 1 Ch. App. 396; 35 L. J. Ch. 467.

^d *Mason v. Shrewsbury and Hereford Railway Company*, 40 L. J. Q. B. per Cockburn, C. J., at p. 297; L. R. 6 Q. B. 578.

¹ *Duinneen v. Rich*, 22 Wis. 550; *Huff v. McCauley*, 53 Penn. St. 206;

by writing not under seal, except in the case of an act of parliament, a custom, or a will. The doctrine that things corporeal lie in livery, but incorporeal rights in grant, has been recognized at law from the earliest times,^c and the rule that easements can be created only by deed of grant, has been affirmed in many decisions of later years. Thus it was said by Bayley, J., in the case of *Hewlins v. Shippam*^f: "A right of way, or a right of passage for water (where it does not create an interest in the land), is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery, but in grant; and a freehold interest in it cannot be created or passed (even if a chattel interest may, which I think it cannot) otherwise than by deed;" and, after citing numerous authorities, the learned judge continued, "upon these authorities we are of opinion that although a parol license might be an excuse for a trespass till such license were countermanded, that a *right and title* to have passage for the water, for a freehold interest, required a deed to create it, and that as there has been no deed in this case, the present action, which is founded on a right and title, cannot be supported."

In America it is well settled that covenants between adjoining landholders that one estate shall thereafter enjoy certain rights or privileges in the other, as that no building shall be erected thereon, create an interest in the nature of an easement, which may be enforced in favor of the so-called dominant estate over the other, either at law or in equity, as the case may be.¹

Covenants
by land-
owners.

Fahr v. Dean, 26 Mo. 116; *Dark v. Johnston*, 55 Penn. St. 164; *Crysler v. Creighton*, East. T. 2 Vic. (Canada); *Mumford v. Whitney*, 15 Wend. 380; *Pitkin v. Long Island Railway Co.* 2 Barb. N. Y. (Ch.) 221.

^c Co. Litt. 9 a, and 42 a.

^f 5 B. & C. at p. 229. See, also, *Cocker v. Cowper*, 1 C. M. & R. 418; *Fentiman v. Smith*, 4 East, 107; *Mayfield v. Robinson*, 7 Q. B. 486, and *The Duke of Somerset v. Fogwell*, 5 B. & C. 875.

¹ See *Parker v. Nightingale*, 6 Allen, 341; *Gibert v. Peteler*, 38 Barb. 488; *Clark v. Way*, 11 Rich. Law, 624; *ante*, p. 82, note.

It has been contended that as an easement cannot be created otherwise than by deed, an *agreement* for an easement not under seal is void — so much so, that no action will lie for breach. There are cases, however, in which an action may be maintained for breach of a written contract for an easement, although no easement is actually created by the writing.^a

A mere license in the nature of an easement may be acquired in any way by which permission can be understood to have been given, and whether there is any writing in existence to prove the grant or not.¹ The case of *Hewlins v. Shippam*, above noticed, shows that such an interest may be created by word of mouth only, and, though it is scarcely necessary to cite them, there are other authorities to the same effect.^b So, also, there are authorities to show that licenses can be given by deed as well as by writing not under seal. If licenses can be conferred by word of mouth only, it hardly requires demonstration that they may be conferred by writing; but it may be asked, if a license in the nature of an easement is given by deed, in what respect does the interest granted differ from an easement, and is not the interest conferred really an easement? Although the interest is conferred by deed it may frequently only be a license that the grantee acquires, but whether it is so depends upon the words employed in the deed. The nature of licenses is very clearly explained in the judgment of the Court of Exchequer in the case of *Wood v. Ledbitter*,^c and it will be seen from that judgment that mere licenses may be given by deed, as well as by writing not under seal or by word of mouth, for it is there said, “But suppose the case of a parol license to come on any land, and there to make a watercourse to flow on to the land of the licensee. In such a case there is no valid

^a *Smart v. Jones*, 15 C. B. N. S. 717; 33 L. J. C. P. 154. And see *Wetherell v. Brobst*, 23 Iowa, 589.

¹ See *Morse v. Copeland*, 2 Gray, 302.

^b *Fentiman v. Smith*, 4 East, 107; *Liggins v. Inge*, 7 Bing. 682; 9 L. J. C. P. 202; *Cocker v. Cowper*, 1 C., M. & R. 418.

^c 13 M. & W. 838; 14 L. J. Exch. 161.

grant of the watercourse, and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse, and if it did, then the license would be irrevocable.”

In addition to these modes of acquiring licenses, they may frequently be implied from the passive acquiescence of the grantor in the act of the licensee; but in many instances, when the acquiescence is not sufficient, or of such a character as to support a defence of leave and license in an action, it is sufficient to entitle the *quasi*-licensee to the equitable assistance of the court to restrain interference with the enjoyment of the privilege. In *Davies v. Marshall*,^j which was an action for obstruction of light and for removing support, it was pleaded on equitable grounds that the plaintiff acquiesced in the acts of which complaint was made; and Willes, J., said: “The plea, as pleaded, seems to set up either that the plaintiff actually gave leave for the acts to be done whereby the injury was caused, or that he conducted himself in such a manner as that a reasonable man would conclude from his conduct that he did give that consent which is not expressly proved to have been given. The conduct sometimes amounts to an estoppel, and is such evidence of leave and license as cannot be controverted by the person so conducting himself.” So, in the case of *The Rochdale Canal Company v. King*,^k which was a suit by the plaintiffs for an injunction to restrain the defendant from taking water for their canal for the purpose of generating steam in his engine. The practice of taking water for this purpose had continued for many years, and it was sworn on the part of the defendant that when the mills of the defendant were built, express notice was given to the canal company of an intention to make a communication with the canal in order to draw water from it for the purpose of generating steam, and that

Implied
from acqui-
escence.

^j 10 C. B. N. S. 697; 31 L. J. C. P. 61.

^k 2 Sim. N. S. 78; 20 L. J. Ch. 675; *Bankart v. Houghton*, 27 Beav. 425; 28 L. J. Ch. 473; *Bankart v. Tennant*, L. R. 10 Eq. 141.

the servants and agents of the company superintended the laying down of the pipes, and were aware of the uses to which they were to be applied, and made no objection. "Now, unquestionably, if this be true," said Lord Cranworth, V. C., in his judgment, "the plaintiffs can have no relief in this court. Such conduct, even if it be not sufficient to sustain a plea of leave and license in bar to an action, certainly incapacitated the plaintiffs from obtaining any assistance in a court of equity."

In some instances, also, licenses, like easements, may be acquired by grant implied from surrounding circumstances, as without them some right, or the benefit of some agreement, may be incapable of enjoyment, and it must have been intended that such licenses should have been given. An instance of this occurred in the case of *Hewitt v. Isham*.¹ In that case an agreement for letting land had been made, and the following clause was inserted: "All the hedges, trees, thorn-bushes, fences, with the lop and top, are reserved to the landlord." To an action for trespass against the landlord for breaking and entering the land and drawing the trees over it, the defendant pleaded leave and license, and it was held that the reservation in the agreement afforded evidence of leave and license, so that the plea was proved.

ACQUISITION OF EASEMENTS BY GRANT.

Taking the modes by which easements may be acquired to be five in number, as above-mentioned, the first of them is acquisition by GRANT. It has already been explained that easements, being incorporeal rights, can be granted only by deed; but that, though in many cases no deed can be shown to have been executed in fact, or actually to have existed, yet that, under certain circumstances, it will be presumed by the law that there was a deed by which the right was created, and that from accident or loss the deed cannot be produced. In such cases the grant is said to be implied or presumed.

Implied
from sur-
rounding
circum-
stances.

Acquisi-
tion by
grant, ex-
press or
implied.

¹ 7 Exch. 77; 21 L. J. Exch. 35; *Foster v. Spooner*, Cro. Eliz. 17; *Liford's case*, 11 Coke's Rep. 47.

Though there are many circumstances under which easements cannot be acquired by the other recognized means by which they may be created, there are scarcely any under which a grant may not be made. But it has already been shown that a new species of easement cannot even be created by grant so as to be made appurtenant to land, although a grant of such a right is perfectly good against the grantor.^m

It will be seen hereafter that a tenant cannot acquire an easement in land belonging to his lessor, by prescription at common law, even though the land is in the occupation of another tenant; but this is not so in the case of a grant, for there is no reason why an occupier of land should not grant a limited interest, or a mere incorporeal right in his soil to another person, to continue during his holding, or for any shorter period, unless he is restrained from so doing by private arrangement with his landlord.ⁿ Should such a grant be made it is not of course in the power of a tenant to bind his landlord by it, and a grant in excess of his interest will be void as to the excess.

Grant by
one tenant
to another.

And so it is held, that the grantor of an easement must be the owner of the fee.¹ A tenant for years, or for life, cannot by grant create a permanent easement in the estate, although perhaps he could give a *license*, which might be valid during the continuance of his term, unless he thereby injures the lessor, or remainderman.

So the grantor must be the *sole* owner of the fee. One joint owner or tenant in common cannot create an easement in the common estate, as against his co-tenant, though probably he would be himself estopped to dispute a grant thus made.²

For the same reason one tenant in common cannot, when conveying his own interest in the common property, create

^m See *ante*, p. 21.

ⁿ *Large v. Pitt*, Peake Ad. 152.

¹ See *Portmore v. Bunn*, 1 B. & C. 694.

² See *De Witt v. Harvey*, 4 Gray, 486; *Crippen v. Morss*, 49 N. Y. 63.

“by reservation” a personal and separate easement over the same for the benefit of his adjoining separate property.¹

A man may not derogate from his own grant; if, therefore, the prevention of the enjoyment of an easement would be an act in derogation of a grant, the law will not allow a landowner to prevent that enjoyment, although no express grant of the easement has been made. The case of *Popplewell v. Hodkinson*^o was an action for removing support received from underground water by draining land. It was said in the Exchequer Chamber that there is nothing at common law to prevent the owner of land draining if he desires to do so, though it may happen that where a person grants land to another for a special purpose — as, for instance, for building — the law will prevent the grantor draining his own adjoining land if the draining would have the effect of rendering the land granted less fit for the special purpose for which it was granted than it otherwise would have been; the law so restrains his freedom, simply on the ground that the grantor, if permitted to drain and thereby remove the support necessary for the buildings, would derogate from his own grant. And on the same principle if a man sells a house in which there are windows overlooking the adjoining land, and he retains that, it is held in *England*, he cannot afterwards build on the land in such a manner as to darken the windows, for when granting the house he is presumed also to have granted a right to light for the windows.^p

On the same principle in the recent case of *Siddons v. Short*,² it was held that where a vendor of land sells the same knowing that the vendee intends to erect substantial buildings thereon, he impliedly covenants that he will not use his ad-

¹ *Marshall v. Trumbull*, 28 Conn. 183. And see *Clark v. Parker*, 106 Mass. 557; *Austin v. Cox*, 118 Mass. 58.

^o L. R. 4 Exch. 248; 38 L. J. Exch. 126.

^p *Coutts v. Gorham*, Moo. & Mal. 396; *Cox v. Matthews*, 1 Vent. 239; *Palmer v. Fletcher*, 1 Lev. 122; *Sir T. Raym.* 87; *Palmer v. Paul*, 2 L. J. Ch. 154 (not elsewhere reported). The American law is different.

² 2 C. P. Div. 572 (1877). See, also, *Caledonia Railway Co. v. Sprot*, 2 Macq. 449.

joining land in a manner to derogate from his grant; and therefore that when A. sold B. a portion of land for an iron foundry, he could not afterwards work the coal mines in his adjoining land so near to the boundary line as to endanger the support of the *land* granted; and that the grantee is entitled to an injunction upon showing a reasonable probability of damage, though none has yet been actually sustained.

Easements may, also, sometimes be acquired from the circumstance of the servient owner being estopped from denying a right to the enjoyment of them — as, for instance, if a person without title professes to grant an easement; for, after such grant, he will be estopped from denying the right to such an easement if he subsequently acquires the fee in the servient tenement.¹ So where a lease of a piece of land was granted, and the land was described, among other particulars, as “bounded on the east and north by newly-made streets,” and a plan was indorsed on the lease which showed “new streets,” in those positions, and it appeared in evidence that when the lease was granted the strips of land, described on the plan as new streets, were, on the east, a piece of waste ground, and on the north a piece of land indistinctly marked out as a street, or intended street, it was held that the lessor was estopped by his deed from denying that there were streets or ways in the places indicated in the lease. The lessee had built the houses he had covenanted in the lease to build, and upon which the new streets were intended to abut, and it was held that though no public streets had been made, the lessee was entitled to rights of way over the places where the new streets were described in the lease.’

And this principle is generally adopted in the American law;² but solely on the ground of *estoppel*, the deed not

¹ Rowbotham v. Wilson, 8 E. & B. per Watson, B., at p. 145; 27 L. J. Q. B. at p. 64; Roberts v. Karr, 1 Taunt. 495.

² Moses v. Sanford, 2 Lea (Tenn.), 655.

— Espley v. Wilkes, L. R. 7 Exch. 298; 41 L. J. Exch. 241; Harding v. Wilson, 2 B. & C. 96.*

² See Parker v. Smith, 17 Mass. 413; O’Linda v. Lothrop, 21 Pick. 292; Tufts v. Charlestown, 2 Gray, 271; Smith v. Lock, 18 Mich. 56; Smyles

amounting to a *contract* or covenant with the grantee, that he should have such a right of way, if the grantor had no interest in the soil of the alleged way.¹

An easement may be acquired by grant for any period, either permanently, or for a term of years, or until the happening of a particular event; and in this respect an easement acquired by grant differs from an easement acquired by prescription, for it will be seen hereafter that an easement cannot be acquired by prescription unless the prescriptive user has been such as to give a good title against all persons, including the owner of the fee in the servient tenement; and that, although claims may be made under the Prescription Act² in right of the occupier of the dominant tenement, the easement is acquired as at common law, not merely for the occupier, to continue during his interest, but for the owner of the fee simple to continue until it is released. That easements may be acquired under a grant for a term of years, or any other limited period, is established by various cases. Thus, in *Davis v. Morgan*,³ a grant of right to divert water from a river to a mill for ninety-nine years is mentioned; and in *Large v. Pitt*,⁴ it is declared that one tenant can have an easement in land of his lessor occupied by another tenant by grant from the latter, although such a right could not be acquired by prescription.

Easements may be acquired by express grant, either by particular description, or under the general words in a deed of conveyance.⁵

Acquisition by express grant.

In conveying land with easements by deed, it will

v. Hastings, 22 N. Y. 217; *Stetson v. Dow*, 16 Gray, 373; *White v. Flannigan*, 1 Md. 540.

¹ *Howe v. Alger*, 4 Allen, 206. And see *In re Mercer Street*, 4 Cow. 542.

² 2 & 3 Wm. IV. c. 71, s. 5.

³ 4 B. & C. 8.

⁴ *Peake Ad. Ca.* 152. See, also, *Ardley v. St. Pancras Guardians*, 39 L. J. Ch. 871; *Oakley v. Adamson*, 8 Bing. 356; *Duke of Somerset v. Fogwell*, 5 B. & C. 875. And see *Kuhlman v. Hecht*, 77 Ill. 570.

⁵ An agreement under seal for the use of a way operates as a grant of a right of way, and not merely as a covenant for quiet enjoyment. *Holms v. Seller*, 3 Lev. 305.

readily be seen that there is a great difference in the case of existing easements to which the grantor is entitled in the land of third persons, and which are appurtenant to the land then being conveyed, and *quasi*-easements which he has been in the habit of using in land of his own, which he is not at the time conveying.^w The former are easements already created, and existing in the character of easements before the conveyance is executed, and the effect of the conveyance is merely to transfer the right of the grantor to the grantee of the land; but, in the case of the *quasi*-easements, as long as the ownership of the land conveyed and the land retained is united in the person of the grantor, those rights are not easements at all, but merely "proprietary rights" which the owner of the land is entitled to enjoy in his character of owner, and as a part of the rights incident to his ownership of the soil. When, therefore, by conveying the land, he gives the easements to the grantee, he does not give easements previously created and existing in the character of easements, but he creates new rights and annexes them to the newly-made dominant tenement.

If an owner of land is possessed of an easement in the land of *another person*, he may, on conveying his own land, expressly convey the easement also by particularly describing it in the deed of conveyance, and the grantee of the land will become entitled to it; and so, also, an owner of land, on conveying a part of his land, may, *by particular description*, give the grantee of the part a right of way or other easement over the part reserved, and the grantee will likewise become entitled to that easement. In the former case there is merely an assignment of an existing easement; in the latter, there is a grant of a newly created right.

Instead of particularly describing the easements which vendors intend to grant to their purchasers, they often merely employ the general words ordinarily inserted in deeds of conveyance, and questions of some nicety then frequently arise as to the easements to which the purchasers are entitled under their deeds. It is under these cir-

Express
grant by
particular
description.

Express
grant by
general
words.

^w *Morris v. Edgington*, 3 Taunt. 24.

cumstances that the distinction has more commonly become apparent between easements enjoyed in the land of third persons, and those *quasi*-easements which the vendor has been accustomed to use in his own land which he is not at the time conveying, and which, not being really easements, become then newly created, if granted at all, by the deed of conveyance.^x

All easements, properly so called, to which a landowner has a right in the soil of a *third person*, will pass to a grantee of the land under the general words of conveyance, "together with all easements and appurtenances;" and even if the word "easements" is omitted, the word "appurtenances" is sufficient to carry those rights.^y Easements of necessity will probably pass to the grantee of land without any general words of this kind, and they will certainly pass under the general word "appurtenances."^z

IN AMERICA,

it is well settled that an easement of a right of way, over another's land, however acquired, which is really appurtenant

^x In the case of *Wood v. Saunders*, L. R. 10 Ch. 582; 44 L. J. Ch. 520, Hall, V. C., speaking of the general words in a deed of conveyance, and the value to be attached to them, remarked, that "It was said that in the conveyance which was afterwards made, there were a great number of general words put in, which are unmeaning and insensible, according to the strict literal rule of construing every word as passing something more than would be passed without it. It was said that there were some general words put in, such as 'all houses, outhouses, buildings, drains,' and so forth, and that being put in, you ought to hold that something *extra* passed, because all those would pass without being enumerated. General words, we all know, are almost always, if not always, unmeaning; and you can, in fact, only lay hold of them to sometimes extend the operation of an instrument; as, for example, to easements which have become extinguished by unity of seisin, or enjoyment, or in some other way. They have no operation, and the only wonder is that they have been allowed to remain so long in the conveyancers' pigeon-holes to be put in every deed, when, in truth, they have really no meaning or effect at all."

^y *Whalley v. Thompson*, 1 B. & P. 371; *Morris v. Edgington*, 3 Taunt. 24; *Skull v. Glenister*, 16 C. B. (N. S.) 92; 7 L. T. 827; *Beaudley v. Brook*, Cro. Jac. 189.

^z *Pinnington v. Galland*, 9 Exch. 1; 22 L. J. Exch. 348; *Barlow v. Rhodes*, 1 C. & M. 439; 2 L. J. N. S. Exch. 91.

to the land conveyed, passes with a deed of the land and "all appurtenances," though not specifically mentioned.¹

It is also clear that if such right of way is not complete at the time of the conveyance, but only partially acquired, as by an adverse use for only ten years, and so not exactly an appurtenance, the inchoate and imperfect right will pass under the word "appurtenances," so that the grantee can tack his subsequent adverse use to his grantor's former adverse use, and thus make out a complete and perfect right to the easement.² It is also true that a right of way may be really appurtenant to other land, although in the instrument creating or reserving it no words of inheritance are used; for such an easement is never presumed to be personal, when it can fairly be construed as appurtenant to some other estate.³

So a provision in a deed of land that no building is to be erected thereon by the grantee, his heirs or assigns, creates an easement in or a servitude upon the land so conveyed, which inures not only to the grantor personally, but also attaches to his remaining land, as appurtenant thereto, when the nature of the restriction, and the situation of the respective lots indicates that it was intended for the benefit of the grantor's remaining land; and being so appurtenant, the restriction may be enforced by a subsequent grantee of the lot so originally reserved.⁴ But sometimes the word "appurtenances"

¹ See *Kent v. Waite*, 10 Pick. 138; *Oakley v. Stanley*, 5 Wend. 523; *Underwood v. Carney*, 1 Cush. 285; *Seavey v. Jones*, 43 N. H. 443; *George v. Cox*, 114 Mass. 387; *Barker v. Clark*, 4 N. H. 382; *Dennis v. Wilson*, 107 Mass. 591; *Spaulding v. Abbott*, 55 N. H. 425; *Handy v. Foley*, 121 Mass. 258; *Huttemeier v. Albro*, 18 N. Y. 48; *Voorhees v. Burchard*, 6 Lans. 176; 55 N. Y. 98.

² *Leonard v. Leonard*, 7 Allen, 277, where the subject is carefully examined. This would probably be so in all those States where two adverse possessions under successive claimants can be tacked to make out the required period. See *Ref. Church v. Schoolcraft*, 65 N. Y. 145; *Winslow v. Newell*, 19 Vt. 164.

³ *Dennis v. Wilson*, 107 Mass. 592. See *Bowen v. Connor*, 6 Cush. 132; *Barnes v. Lloyd*, 112 Mass. 232; *Borst v. Empie*, 1 Seld. 33; *Winthrop v. Fairbanks*, 41 Me. 312; *Burr v. Mills*, 21 Wend. 290.

⁴ *Peck v. Conway*, 119 Mass. 546; *Herrick v. Marshall*, 66 Me. 435; *Trustees v. Lynch*, 70 N. Y. 440; *Lattimer v. Livermore*, 72 N. Y. 174.

in a deed has been held not to convey anything except what was legally appurtenant to the land in the hands of the grantor, and not to include an inchoate easement in the land of another, which had not at the time of the grant ripened into a complete legal right, and so was not legally appurtenant and attached to the premises described in the deed.¹

Therefore, where A. conveyed to S. a tract of land with the buildings thereon, "with all the privileges and appurtenances to the same belonging," and at the time of the grant water was conveyed to the buildings by an aqueduct from a spring on the land of H., a third party, but which A. had not a legal right to continue against the consent of H.; it was held that the deed to S. did not include any right to the spring or aqueduct, so as to render A. liable to S. on the covenants of warranty in his deed, if H. deprived S. of the water.² It might be different if the spring and aqueduct was on the other *land of the grantor*; for it might then pass on other principles.³

So where one owns three adjoining lots, A, B, and C, and has been accustomed to pass from A to C over B, and conveys lots A and C to L., with all "the privileges and appurtenances," and lot B to another party, neither deed alluding to any way over lot B, L. does not acquire a right to pass over lot B from A to C under the phrase "appurtenances," it not being necessary, but only convenient.⁴

Those *quasi*-easements which have never existed, or which have ceased to exist as easements properly so called, What will not pass. by reason of unity of ownership, will not generally pass under a conveyance of the *quasi*-dominant tenement with the "appurtenances." In the case of *Whalley v. Thompson*,⁵ above noticed, Eyre, C. J., said: "There can be no doubt that the word 'appurtenances' may convey an existing right of way. But from the moment that the possession of two closes

¹ *Swazy v. Brooks*, 34 Vt. 451.

² *Spaulding v. Abbott*, 55 N. H. 423. And see *Seavey v. Jones*, 43 N. H. 441.

³ *Coolidge v. Hagar*, 43 Vt. 9.

⁴ *Barker v. Clark*, 4 N. H. 380.

⁵ 1 B. & P. at p. 375; *Barlow v. Rhodes*, 1 C. & M. 439; 2 L. J. N. S. Exch. 91.

is united in one person, all subordinate rights and easements are extinguished." . . . "I admitted during the argument that the word 'appurtenances' would carry any easement or legal right. Upon that it was observed that if the road in question had been described in the devise, it would have passed, and that observation was followed up by a question whether the word 'appurtenances' would not carry any easement or right that would pass by a particular description; to which I answered that its operation must be confined to an old existing right, and that if the right of way had passed in this instance, it must have passed as a new easement."

This was decided in America so early, at least, as 1817, in *Gayetty v. Bethune*,¹ where the owner of two adjoining lots, both of which fronted on the same public street, had used, for many years before his death, a circuitous way from the rear of one lot over the other to the public street, instead of coming out directly thereon. Upon a division of the two lots among his heirs, some time after his decease, the lot having the way *de facto* leading from it was set off to one heir "with all the privileges and appurtenances thereto belonging," but no express mention was made of this way, nor was there any general phrase "with all ways heretofore used therewith," and it was held that no right of way passed under the general words of privileges and appurtenances, there being no necessity for it, but only a convenience. And this principle has been frequently adopted in subsequent cases, in the same court.² It was also fully approved in the recent case in New York, of *Parsons v. Johnson*.³

There are, however, a few instances in which the word "appurtenances" has been held to pass easements which ought not strictly to have been so denominated, on account of their having ceased to be easements. This was so in the case of *Morris v. Edgington*,^b in which it was said that all

¹ 14 Mass. 49. And see *Oliver v. Hook*, 47 Md. 301.

² See *Grant v. Chase*, 17 Mass. 443.

³ 68 N. Y. 62, in which many cases supposed to be contrary were critically examined and distinguished.

^b 3 Taunt. 24. And in this case the way might have been considered a way "by necessity." See *Harris v. Smith*, 40 Up. Can. Q. B. 33.

deeds are to be taken most strongly against the maker, and all deeds and writings are to be taken *secundum subjectam materiam*; that in that case there was no way heard of at all belonging to the premises in question except one which was not strictly appurtenant, and that as there was no other way, and as it was impossible that the parties to the deed, who were supposed necessarily to understand the law, could suppose the way in question was a way appurtenant, they must have meant that that particular way should pass, although they used the improper term "appurtenant." A similar decision was given in the case of *James v. Plant*,^c as it was thought the parties to the deed used the word "appurtenant" by mistake, and that their intention was to pass a way which could not strictly be so designated.

As the general word "appurtenances" is not usually sufficient to convey to a purchaser of land those *quasi-easements* which the vendor has been in the habit of using for his own convenience, during unity of ownership in his land which is not being conveyed, the further question arises whether *any general words* are sufficient to pass to the purchaser a right to use those privileges, and to erect them into easements properly so called. If proper general words are employed this effect may in certain cases be produced, but in this respect a further distinction has been made between those *quasi-easements* which existed as easements proper before the ownership was united, and those which were for the first time used during unity of ownership and have never actually existed as easements. At the time of the publication of the first edition of this book the law appeared to be pretty well settled on this point; and it was taken to be that in the former case the privilege might by the use of suitable general words be passed to a purchaser of the dominant part of an estate, and be reconverted into easements; while in the latter, that effect could not be produced under any general words in a deed of conveyance. By two decisions of quite recent date, however, this doctrine has been

^c 5 B. & Ad. 791; in Exchequer Chamber, 4 A. & E. 749; 6 L. J. N. S. Exch. Ch. 260.

somewhat modified, and it is not now very easy to define the general principle of law on this point.

There appears to be no doubt that to grant to a purchaser of land easements which existed as easements before, but which have been extinguished by unity of ownership, by means of the general words in a deed of conveyance, it is necessary to use particular words indicative of an intention to make the grant. It has been laid down that "if in the case of an easement extinguished by unity of ownership a man grants the land to which before the extinguishment the right of common was attached, and uses only the words 'appertaining' and 'belonging,' the right will not pass, these words not being sufficient to revive the right. There are, however, apt words for the purpose of passing such an easement; and if you will only insert the words 'or therewith used and enjoyed,' the right would pass."^a

Since the trial of the case from the report of which these words are taken, there have been many decisions confirming the law as it is there laid down; but the possibility of granting easements by these general words had apparently always been confined to easements which existed before union of ownership, and it had never been extended to those *quasi*-easements which had been first used during unity of ownership. In a recent case on this subject, the law was summed up by Kelly, C. B., in the following terms: "The law resulting from the numerous and complicated cases to which we have been referred is simply this: When the owner of a piece of land has a right of way over adjacent land, so that he may maintain at any time an action for an obstruction, if afterwards by inheritance or purchase both pieces of land come to one and the same owner, the right is necessarily at an end, the enjoyment thenceforth being the mere exercise of a right of property in his own land. But if, at a later period, the properties again fall into the ownership and possession of different persons, and in the conveyance of the land to which the way was formerly attached, the words are found 'to-

Grant of easements "used and enjoyed."

Easements first "used and enjoyed" during unity of ownership.

^a Barlow v. Rhodes, 1 C. & M. at p. 448.

gether with all ways, &c., used or enjoyed therewith,' the effect of these words is to revive the right that formerly existed, and which has been not extinguished, but only suspended. But since it does not appear here that at any antecedent time there existed a right over one of these pieces of land attached to the other piece of land, the effect of these words cannot make or revive a right of way that never before existed." ^e

Recently, however, as before stated, two cases have been decided by which the doctrine, that on severance of two parts of an estate, by sale of the *quasi-dominant* portion, a grant of easements by general words can in no case erect into easements practices which a landowner has used in one part of his estate for the convenient enjoyment of the other, unless the practices existed as easements before the ownership of the two parts of the estate was united, has been modified. These cases are *Watts v. Kelson*^f and *Kay v. Oxley*.^g In the former the lords justices overruled the decision of the master of the rolls. That case, which had reference to a watercourse, was that the owner of two adjoining properties conveyed to the plaintiff one portion, "together with" among other things "all waters, watercourses, rights, privileges, advantages, and appurtenances whatsoever, to the same hereditaments and premises belonging or appertaining, or with the same or any part thereof now or heretofore used and enjoyed, or reputed as part or parcel thereof, or appurtenant thereto." The question was whether any right passed to the purchaser to the continuance of certain water pipes in the part of the land the grantor retained and which subsequently became the defendant's. The pipes ran through the grantor's land at the time of the plain-

Modifica-
tion of
rule.

^e *Langley v. Hammond*, L. R. 3 Exch. at p. 161; 37 L. J. Exch. 118; *Thomson v. Waterlow*, L. R. 6 Eq. 36; 37 L. J. Ch. 499; *James v. Plant*, 4 A. & E. 749; 6 L. J. N. S. Exch. Cham. 260; *Worthington v. Gimson*, 2 E. & E. 618; 29 L. J. Q. B. 116; *Wardle v. Brocklehurst*, 1 E. & E. 1058; 29 L. J. Q. B. 145.

^f L. R. 6 Ch. App. 166; 40 L. J. Ch. 126.

^g L. R. 10 Q. B. 360; 44 L. J. Q. B. 210.

tiff's purchase, but were not there previously to the grantor's unity of ownership, and the plaintiff contended that under the above general words he became entitled to have the continued use of the pipes. The case was decided by the master of the rolls in the defendant's favor, upon the ground that the artificial watercourse was first made and begun by a person who was owner of both properties and had no prior existence at a time when the properties were separately owned, and that being the case, the general words were not sufficient in his opinion to pass the right; but this judgment was overruled. The lords justices decided the case upon other grounds, but on the point now under consideration said they also thought that the general words in the deed were amply sufficient to pass the easement, for that there was a recognized distinction between easements in their nature continuous such as that in the case before the court, and those which were only used from time to time, as a right of way, and that though the words in the deed might not be sufficient to pass a right of way, if the way had been first used during unity of ownership, yet that they were amply sufficient to pass a right to a watercourse, for that was in its nature continuous, even though it was made during unity of ownership. The other case, *Kay v. Oxley*, went still farther, for that was a case of a right of way. One of two farms belonging to the same person was let, and the lessee with the lessor's permission, built a hay-loft, with windows for the reception of the hay opening over a private way in the lessor's ground, and to bring the hay to the loft he carted it along the way up to the loft. This user of the way was a mere license by the lessor, though as the loft had been built in that position with his sanction, and there was no other means of getting to it, it might have been a question, whether the license was not irrevocable. That question, however, did not arise. The farm with the loft was sold, and the conveyance contained the following general words: "Together with all buildings, erections, fixtures, common hedges, ditches, fences, ways and rights of way, waters, watercourses, drains, cisterns, lights and rights of light, liberties, privileges, easements, advantages and ap-

purtenances whatsoever to the said messuage or dwelling-house, cottage, land, and hereditaments, or any of them appertaining or with the same or any of them now or heretofore demised, occupied, or enjoyed, or reputed as part or parcel of them, or any of them, or appurtenant thereto." It was held that a right of way to the loft passed to the purchaser under these general words, although before the unity of ownership of the two farms no such right existed, and the loft was not built. The decision naturally turned upon the particular facts of the case, and the special words used in the conveyance; but it is a decision of great importance, as it involves a modification of what was previously taken to be the rule of law. Blackburn, J., said: "It is not disputed at all that if the conveyance had stopped at the word "appertaining," the plaintiffs' case would have been different; but it goes on to add the words, "with the same now or heretofore demised, occupied, or enjoyed or reputed as part or parcel of them, or any of them, or appurtenant thereto." Now we have to look at the facts, in order to see whether there was in fact the particular right of way in question occupied or enjoyed as appurtenant, or reputed as appurtenant to the property conveyed. Mr. Herschell says that when a man is occupier of two adjoining pieces of land, and uses one for the convenience of himself as the actual occupier of both, anything he may do there is *primâ facie* not a right appurtenant to the other of them, and would not pass as appurtenant; that it is for his own convenience as occupier of the two that he exercises his right of passing through one to the other, and that he does not *primâ facie* enjoy or occupy the way he thus makes to the one as being appurtenant to the other of them, and that therefore it would not pass as a right enjoyed as appurtenant. But though that be the case *primâ facie*, yet if there be acts of ownership and user by a man for the enjoyment and exclusive convenience of himself as occupier of both the adjoining lands, notwithstanding the cases that have been cited, I do not think in point of law we can say the way being so enjoyed and occupied by a man only during the time he has unity of possession and unity of seisin necessarily prevents its

being enjoyed as appurtenant." The passage from the judgment of Kelly, C. B., in *Langley v. Hammond*, already cited, was then referred to, and Blackburn, J., remarked that "no doubt the chief baron does lay that down, and if it had been a decision of the full Court of Exchequer we should have been obliged to leave it to a court of error to say whether that was right. I cannot agree that a right of way that never previously existed cannot as a matter of law be created on the construction of words like those in this conveyance." It is also to be noticed that in the case of *Langley v. Hammond*,^f already mentioned, Bramwell, B., made some remarks on this point, showing that he held views similar to those expressed by Blackburn, J., above set out. That learned judge expressed much doubt whether a conveyance of land containing such general words as "together with all ways therewith used and enjoyed," would not operate as a grant of any ways made and first used *during* unity of ownership *if they were of a defined and permanent character*, as well as of ways which existed as easements *before* unity of ownership.

It will now be seen that an important modification has been wrought in the law by these recent decisions, and it is consequently somewhat difficult to say with any feeling of certainty what the rules of law precisely are with regard to grants of easements by general words in a deed of conveyance, if the owner of two estates has, during the unity of ownership, been in the habit of using the one he retains as servient to the one he is conveying. But taking the view expressed by the lord chief baron, which was founded upon the preceding decisions, and modifying it by the two more recent judgments, the law now seems to be this — if a man has two adjoining properties, and exercises a *quasi*-easement over the one for the beneficial enjoyment of the other, and sells the *quasi*-dominant tenement — if he sells it merely "with the appurtenances," no easement is gained by the purchaser; if the *quasi*-easement existed as an easement before unity of ownership of the two properties, and the *quasi*-dominant tenement is sold "with

Result of
authorities
as to grants
by general
words.

^f L. R. 3 Exch. at p. 170.

the easements used and enjoyed therewith," the purchaser will become entitled to the easement; if the *quasi*-easement did not exist as an easement before unity of ownership, and the *quasi*-dominant tenement is sold "with the easements used and enjoyed therewith," the purchaser will get the easement if it is of a continuous character, as, for instance, a watercourse; but ordinarily he will not get it if it is only used from time to time, as a right of way. There are cases, however, in which the purchaser may get the easement, even though it is not continuous, for the general words in the deed of conveyance may be of such a character that the right will pass; but whether the right is gained must depend in each case upon the surrounding circumstances and the words used in the deed.

To constitute a grant of an easement, it is not necessary that the word "grant" should actually be used in a deed; but it is sufficient if the intention to grant be manifested;^g therefore an agreement under seal, whereby it was agreed that the owner of a particular field should "have and enjoy forever thereafter the right thereafter expressed (that is to say) that it should be lawful to and for the owner or owners for the time being" to have the use of the water of a stream for the purposes of irrigation, was held to operate as a grant of the easement of the watercourse mentioned in the deed.^h So also an agreement under seal for the use of a way may operate as a grant of a right of way, and not merely as a covenant for quiet enjoyment.ⁱ

An easement cannot strictly be made the subject either of exception or reservation in a deed of conveyance of land, for it is neither parcel of the land granted, which circumstance is requisite to enable a thing to be excepted, nor does it issue out of the land, as it should to render it capable of being the subject of a reservation. If, therefore, an easement be incorrectly reserved to a grantor of land, or excepted from the land conveyed, the res-

The word
"grant"
not essen-
tial.

Easements
excepted
or reserved
in a con-
veyance.

^g Per Lord Kenyon, C. J., in *Shove v. Pincke*, 5 T. R. at p. 129.

^h *Northam v. Hurley*, 1 E. & B. 665; 22 L. J. Q. B. 183.

ⁱ *Holms v. Seller*, 3 Lev. 305.

ervation or exception operates as a grant of a newly created easement by the grantee of the land to the grantor.^j

It scarcely needs remark that a grant of an easement is void if it is repugnant to terms of an act of parliament. If, however, the act only partially affects the grant, and the grant is divisible, or can be limited, that part only is void which is inconsistent with the act.^k

Grant at variance with an act of parliament.

A grant of an easement may be made conditionally — that is, that it shall become void on the happening or non-happening of a particular event, or on the performance or non-performance of a certain act. But if the condition is that the grant shall become void on neglect to use the easement granted, the word “void” will be construed “voidable,” and the grant will not be revoked until the grantor has done some act to show his intention to take advantage of the forfeiture.^l

Grant subject to a condition.

IMPLIED GRANTS OF EASEMENTS.

Grants of easements are implied under various circumstances. It will be seen shortly that a grant is implied in nearly every case of acquisition of an easement by prescription,^m but as this will be explained when that mode of acquisition is considered, it will not be noticed further in this place.

As a general rule, a grantee of land or of an easement is entitled by implied grant to any easement in the land of the grantor, which is necessary to render the land or easement granted capable of enjoyment to the full extent. This rule of law seems to depend upon the principle that when the grant was made it must

Implied grant of easements necessary to render a grant beneficial.

^j *Durham and Sunderland Railway Company v. Walker*, 2 Q. B. at p. 967; 11 L. J. Exch. at p. 446; *Goold v. Great Western Deep Coal Company*, 2 De G., J. & S. 600; 12 L. T. 842; 13 L. T. 109; *Finlinson v. Porter*, L. R. 10 Q. B. 188; 44 L. J. Q. B. 56.

^k *Attorney General v. Mayor, &c. of Plymouth*, 9 Beav. 67; 15 L. J. Ch. 109.

^l *Roberts v. Davey*, 1 Nev. & Man. 443; 2 L. J. N. S. K. B. 141.

^m The acquisition of rights to light by prescription is now an exception to this rule.

have been the intention of the parties that the grantee should have the means of using the thing granted, and therefore that he should have all rights and powers in or over the grantor's soil which might be requisite for his purpose. In *Pomfret v. Ricroft*,ⁿ it was said that when the use of a thing is granted everything is granted by which the grantee may have and enjoy such use; as, if a man gives me a license to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another, and not to me. So it was held that if a person has statutory power to make convenient and necessary wagon-ways over the land of another to his coal-pits, he may, under proper restriction, dig in the adjoining soil of the other, and procure materials, if necessary, to make embankments, and he may cut through eminences to make the ways level, for if the level or requisite inclination of the way could only be made by erecting pillars or arches, or procuring materials from a considerable distance and at a considerable expense, the right given by the act would, in many instances, become futile and unavailing by reason of the cost required for its exercise.^o And again, a grant of land having been made reserving for the grantor all mines of coal, with liberty of sinking and digging pits, the grantor was held to have a right to erect a steam-engine, and even in a building of stone, to drain the mines and draw the coal to the surface, the engine being necessary for those purposes, as incident to his liberty to excavate the coal. It was also held that he was justified in making a pond on the land, although that, together with the engine and other machinery, occupied two acres and a half of land; because the pond was a necessary accessory to the engine.^p

Sometimes a grant of easements will be implied from the state of the surrounding circumstances at the time a grant of

ⁿ 1 Wms. Saund. at p. 322 b; *Finlinson v. Porter*, L. R. 10 Q. B. 188; 44 L. J. Q. B. 56; *Hodgson v. Field*, 7 East, 613; *Nicholas v. Chamberlain*, Cro. Jac. 121; *Underwood v. Burrows*, 7 C. & P. 26.

^o *Abson v. Fenton*, 1 B. & C. 195.

^p *Dand v. Kingscote*, 6 M. & W. 174; 9 L. J. N. S. Exch. 279.

land is made, though a question will generally arise in such cases whether regard can be had to anything besides the terms of the deed of grant. In *Hall v. Lund*^a one Pullan had carried on the business of a bleacher in certain premises, and had been in the habit of pouring foul water from his works into a stream, and thereby polluting it. It was arranged that Pullan should assign his business to the defendant, and he therefore surrendered the lease of the premises to Shaw, the plaintiff's predecessor in title, and Shaw granted a new lease to the defendant, in which the latter was described as a "bleacher," and reference was made to the business of bleaching, which the defendant intended to carry on in the premises. Shaw then sold the freehold of the premises to the plaintiff, who began to carry on the business of paper-making in adjoining premises, and sued the defendant for polluting the stream of water. It was held that the court was at liberty to examine the history as well as the previous mode of enjoyment of the defendant's premises, and that as Shaw, the plaintiff's predecessor in title, with a full knowledge of the mode in which the premises had been used by Pullan, granted a new lease of the same premises to the defendant for the same purpose, there was an implied grant of the right to pollute the stream in the same manner Pullan had been accustomed to pollute it.

Grant presumed from surrounding circumstances.

A grant of an easement is often implied after uninterrupted user for twenty years. Implication of a grant after user for twenty years is not so common now as a mode of claiming easements as it was before the passing of the Prescription Act,^c for the claim by prescription under that act is generally adopted in preference: the old mode was not, however, abolished by the act, and it may still be, and sometimes is, used in cases in which a prescriptive title cannot be proved. This mode of claiming an easement, and the consequent passing of the Prescription Act, was referred to by Martin, B., in the case of *Mounsey v. Ismay*,^d in the following terms: "The occasion

Presumption of lost grant after twenty years' user.

^a 1 H. & C. 676; 32 L. J. Exch. 113.

^c 2 & 3 Wm. IV. c. 71.

^d 3 H. & C. 486; 34 L. J. Exch. 52.

of the enactment of the Prescription Act is well known. It had been long established that the enjoyment of an easement as of right for twenty years was practically conclusive of a right from the reign of Richard I., or, in other words, of a right by prescription, unless proof was given of an impossibility of the existence of a right from that period: and a very common mode of defeating such a right was proof of a unity of possession since the time of legal memory. To meet this the grant by lost deed was invented, but in progress of time a difficulty arose in requiring a jury to find upon their oaths that a deed had been executed which every one knew never existed; hence the Prescription Act."

From this passage it would appear that the modern plan of claiming easements under the Prescription Act was intended as a substitute for the ancient method of claiming under a grant by a deed presumed to have been lost after twenty years' enjoyment of the privilege; but it would seem not to be so considered, for the method of claiming easements in the ancient manner may be met with in quite modern cases, and there are instances in which both the ancient and modern systems have been introduced in the same set of pleas.⁴ It may be mentioned here that to support a claim to an easement under a grant presumed to have been lost, it has been said that it should be proved that the user commenced

⁴ The following note on this subject appears in Bullen and Leake's *Precedents of Pleading*, under the title, "Pleas, &c., in Actions for Wrong — Ways." "The plea of a right of way, or of a right to any other easement, by non-existing grant, may sometimes be supported by evidence which would fail to support a prescriptive right of way under the Prescription Act, as where there has been an interruption of enjoyment within the period prescribed by the statute, or where the enjoyment cannot be brought down to the commencement of the suit. (See *Parker v. Mitchell*, 11 A. & E. 788; *Onley v. Gardiner*, 4 M. & W. 496; *Lowe v. Carpenter*, 6 Exch. 825.) It may also sometimes be supported by evidence which would fail to support a plea of prescription at common law, by reason of the right being shown to have commenced within the period of legal memory. Hence it is frequently advisable to plead together in the same case pleas of prescription by the statute of prescription at common law, and of a non-existing grant." An instance of these pleas being pleaded together is to be found in *Bailey v. Stephens*, 12 C. B. N. S. 91; 31 L. J. C. P. 226.

about the time when the grant is presumed to have been made, for where no proof of this is given the evidence goes to prove a prescriptive right and not a grant."

To raise a presumption of a grant of an easement after twenty years' user, it is essential that the user should have been enjoyed as of right. The period of twenty years seems to have been selected as the time after which a presumption of a grant might be made, owing to the circumstance of twenty years being the time which had come to be regarded as sufficient for the acquisition of easements by prescription. But that the enjoyment during that period as a matter of right is essential to raise a presumption of a grant, is determined by the case of *Campbell v. Wilson*,^v where Chambre, J., in summing up to the jury, said that if they were satisfied that the enjoyment was adverse, and that it had continued twenty years and upwards before the action, it was a sufficient ground for their presuming a grant; and that the use of a road as a matter of right by those who claimed it, and submitted to as a matter of right by the possessor of the land over which it was used, was to be considered as an adverse enjoyment; but, he added, if they were satisfied from the whole of the evidence that the enjoyment had been only by leave or favor, or otherwise than under a claim or assertion of right, it would repel the presumption of a grant; and this ruling of the learned judge was approved by the full court. It appeared also, in that case, that if the user had been shown to have originated in a mistake, the presumption of a grant could not have been made.

A presumption of a grant cannot arise if the person against whom the right is claimed was ignorant of or incapable of resisting the user; therefore, no such presumption can be made against a reversioner if the user has taken place during the occupation of the *locus in quo* by a tenant.^w Twenty years' user as

User must have been as of right.

Ignorance of or incapacity to resist user rebuts presumption of a grant.

^u *Blewitt v. Tregonning*, per Patteson, J., 3 A. & E. at p. 585; 5 N. & M. 316.

^v 3 East, 294.

^w *Daniel v. North*, 11 East, 370. See *Davidson v. Nicholson*, 59 Ind.

of right during a tenancy, either for life or years, may, however, raise a presumption of a grant against the termor, and so establish an easement against him during the continuance of the term;^x and if the user of the easement began before the tenancy in the servient tenement, a presumption of a grant may be made against the reversioner after the lapse of twenty years from its commencement, even though the tenancy continued during the whole of the last twenty years of the user.^y

Mere lapse of time, while user of an easement has continued, is not sufficient of itself to raise a presumption of a grant against an owner of land, for the inference must in addition be drawn from accompanying circumstances, and if there is no direct evidence whether the owner of the land had any knowledge of what passed, the inference to be drawn must in a peculiar degree depend on the nature of the accompanying facts: the presumption in such case, in favor of a grant, will be more or less strong as it may be more or less probable that the surrounding facts could not have existed without the knowledge and consent of the owner of the land.^z It has been pointed out above that if the user has taken place by leave or favor, or otherwise than under a claim or assertion of right, those circumstances would repel the presumption of a grant; so, in like manner, no presumption can arise if the right to the user has been contested from time to time. Thus, in the case of *Livett v. Wilson*,^a Best, C. J., said: "I do not dispute that if there had been an uninterrupted user for twenty years, the jury might be authorized to presume it originated in a deed; but, even in such a case, a judge would not be justified in saying that they must, but that they may, presume the deed. If, however, there are circumstances in-

Surround-
ing facts to
be consid-
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with con-
tinuance
of user.

411; *Pearsall v. Post*, 20 Wend. 111; *McGregor v. Wait*, 10 Gray, 75; *Reimer v. Stuber*, 20 Penn. St. 458.

^x *Bright v. Walker*, 1 C., M. & R. at p. 221,

^y *Cross v. Lewis*, 2 B. & C. 686; 2 L. J. K. B. 136.

^z *Gray v. Bond*, 2 B. & B. 667.

^a 3 Bing. 115; 3 L. J. C. P. 186.

consistent with the existence of a deed, the jury should be directed to consider them, and to decide accordingly.”

The fact that an easement was originally enjoyed under an agreement not under seal, does not prevent the presumption of a grant, if more than twenty years have elapsed since the date of the agreement, and if the license has not been renewed within that period.^b

Effect of an old agreement on presumption.

An important question on the subject of implied grants of easements, about which some difference of opinion has existed, is whether an owner of land who has been in the habit of using apparent and continuous *quasi*-easements in his own soil during unity of ownership, does or does not grant or reserve a right to them by implication, if he, without any special stipulation, and without using any general words,^c which could operate as a grant or reservation of them, conveys to a purchaser that portion of his land for the beneficial occupation of which he has been in the habit of using them, or reserves that portion, granting to a purchaser the *quasi*-servient tenement. This question has received much consideration, both in the courts of common law and equity, and as the decisions are somewhat conflicting, it is proposed to consider the various cases in succession, and to state what is the apparent result of them.

Implied grant of apparent and continuous easements.

Cases considered.

The first case to be noticed on this subject is *Pyer v. Carter*,^d which was an action for stopping a drain. The houses of the plaintiff and defendant adjoined each other, and had been previously one house, but that was converted into two, one being sold to the defendant, and the other, at a subsequent time, to the plaintiff. The drain in question ran under the plaintiff's house, and thence under the defendant's. It was decided that the plaintiff was entitled to

Pyer v. Carter.

^b *Dewhirst v. Wrigley*, C. P. Cooper, note at p. 329. And see *Bolivar Man. Co. v. Neponset Man. Co.* 16 Pick. 241.

^c The operation of general words in a deed of conveyance upon *quasi*-easements which a landowner has been in the habit of using during unity of ownership in one part of his property for the beneficial enjoyment of another which he is then conveying, has been considered *ante*, pp. 97-106.

^d 1 H. & N. 916; 26 L. J. Exch. 258.

have the use of the drain by implied grant, as it was used at the time of the defendant's purchase. It was said in the judgment that it seemed in accordance with reason that where the owner of two or more adjoining houses sells one the purchaser shall be entitled to the benefit of all the drains from his house, and be subject to all the drains necessarily to be used for the enjoyment of the adjoining house, without express reservation or grant, inasmuch as he purchases the house such as it is, and that if that were not so, the inconvenience and nuisances in towns would be very great. It was also said that it had been argued that there could be no implied agreement unless the easement was apparent and continuous, and that the defendant stated he was not aware of the drain at the time of his purchase; but it was clear he must have known, or ought to have known, that some drain existed, and if he had inquired he would have known of this drain; that, therefore, it could not be said that such a drain could not have been supposed to have existed, and that by "apparent signs" must be understood not only those which must necessarily be seen, but those which might be seen or known on a careful inspection by a person ordinarily conversant with the subject. This decision has been the subject of much comment, and the first remark tending to restrict the principle of law established thereby was made by Martin, B., in his judgment in the case of *Dodd v. Burchell*,^e when he said, "*Pyer v. Carter* went to the utmost extent of the law; but, if considered, that decision cannot be complained of, for if a man has two fields drained by an artificial ditch cut through both, and he grants to another person one of the fields, neither he nor the grantee can stop up the drain, for there would be the same right of drainage as before, since the land was sold with the drain in it. I agree with the law as laid down in that case, and I think it may be supported without extending the doctrine to a right of way."

A similar decision was given by the House of Lords, on appeal in the Scotch case of *Ewart v. Cochrane*.^f In that case

^e 1 H. & C. 113; 31 L. J. Exch. 364.

^f 4 Macq. 117.

an owner of two adjoining properties, made a tanyard in one, and he laid a drain from the tanyard to a cesspool in the other property, which was a garden. Subsequently he sold the tanyard and afterwards the garden, the drain remaining unaltered. It was held that the purchaser of the tanyard was entitled to the use of the drain. In his judgment Lord Campbell laid down the principles of law in the following terms, and distinctly referred to *Pyer v. Carter*, without disapprobation: "I consider the law of Scotland as well as the law of England to be that when two properties are possessed by the same owner and there has been a severance made of part from the others, anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted shall be considered to follow from the grant, if there are the usual words in the conveyance. I do not know whether the usual words are essentially necessary; but where there are the usual words, I cannot doubt that that is the law. In the case of *Pyer v. Carter* that is laid down as the law of England, which will apply to any drain or any other easement which is necessary for the enjoyment of the property. And we have quotations from the Scotch authorities showing that the law is the same in both parts of the island."

In *Worthington v. Gimson*,^g the case of *Pyer v. Carter* was noticed, and its authority was not disputed.

In *Pearson v. Spencer*,^h which was an action about a right of way, it was said in the judgment of the Court of Queen's Bench: "We do not think that on severance of two tenements any right to use ways, which during the unity of possession have been used and enjoyed in fact, passes to the owner of the dissevered tenement, unless there be something in the conveyance to show an intention to create

Ewart v. Cochrane.

Worthington v. Gimson.

Pearson v. Spencer.

^g 2 E. & E. 618; 29 L. J. Q. B. 116.

^h 1 B. & S. 571. Affirmed in Exchequer Chamber, 3 B. & S. 761. In *Glave v. Harding*, 3 H. & N. 944, 27 L. J. Exch. 286, it was intimated that a right of way may be a continuous and apparent easement, and, as such, pass by implied grant.

the right to use these ways *de novo*. We agree with what is said in *Worthington v. Gimson*, that in this respect there is a distinction between continuous easements, such as drains, &c., and discontinuous easements, such as a right of way."

The next case in which this doctrine of law is recognized, and recognized, indeed, in very express terms, is *Polden v. Bastard*.ⁱ *Polden v. Bastard*,ⁱ in the Exchequer Chamber. Erle, C. J., in his judgment in that case, in which the other judges concurred, said: "There is a distinction between easements, such as a right of way, or easements used from time to time, and easements of necessity, or continuous easements. The cases recognize this distinction, and it is clear law that upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass, by implication of law, without any words of grants; but with regard to easements which are used from time to time only, they do not pass unless the owner, by appropriate language, shows an intention that they should pass."

In the recent case of *Watts v. Kelson*,^j the principle of the decision in *Pyer v. Carter* was followed by the lords justices, and the passage above cited from the judgment of Erle, C. J., in *Polden v. Bastard*, was expressly approved.

The above are the principal cases in which this important doctrine has been supported; but it will be observed that though *Pyer v. Carter* is an authority that apparent and continuous easements are, in the absence of express stipulation, both granted and reserved by implication on partition of an estate, the passage quoted from *Polden v. Bastard* appears merely to contemplate the grant of such easements by the original owner of the whole to his grantee of a portion of an estate, and not a reservation of any easements in the land sold for the benefit of the grantor.

A case in which the doctrine was very much limited, and in which the authority of *Pyer v. Carter* was questioned, is *Suffield v. Brown*,^k which was argued be-

ⁱ L. R. 1 Q. B. 156; 35 L. J. Q. B. 92; 7 B. & S. 130.

^j L. R. 6 Ch. App. 166; 40 L. J. Ch. 126.

^k 4 De G., J. & S. 185; 33 L. J. Ch. 249.

fore Lord Westbury, L. C. It is unnecessary here to describe the facts of this case, but the observations of Lord Westbury are to the effect that on a grant by an owner of an entire heritage, of part of that heritage, as it is then "used and enjoyed," there will pass to the grantee all those continuous and apparent easements which have been, and are at the time of the grant, used by the owner of the entirety, for the benefit of the parcel granted; but that if the owner sells the servient part of his estate, there are not reserved to him, in the absence of express stipulation, such continuous and apparent easements as have been used by the owner for the benefit of the unsold portion during the unity of ownership, for the grantor cannot derogate from his own absolute grant so as to claim rights over the land sold, even though they were *quasi*-easements of an apparent and continuous character at the time of the grant. His lordship next proceeded to explain the fallacy in the judgment of the Court of Exchequer in the case of *Pyer v. Carter*, and declared that he could not look upon that case as rightly decided, and that he must wholly refuse to accept it as any authority. It should be observed, however, that Lord Westbury was careful to explain that throughout his judgment he was speaking of cases where the easement claimed had no legal existence anterior to the unity of ownership, but is claimed as arising by implied grant or reservation upon the disposition of one of two adjoining tenements by the owner of both. The opinion of Lord Westbury was approved by Lord Chelmsford, L. C., in the case of *Crossley and Sons (Limited) v. Lightowler*.¹

Crossley v. Lightowler.

The result of these decisions seems to be this: If the owner of an estate has been in the habit of using *quasi*-easements of an apparent and continuous character over one part for the benefit of the other part of his property, which were first used during the unity of ownership, if he sells the *quasi*-dominant part, the purchaser will, in the absence of express stipulations, and independently of the general words in the deed of conveyance, become enti-

Results of the authorities.

¹ L. R. 2 Ch. App. at p. 486; 36 L. J. Ch. at p. 590.

tled to the easements by implied grant, but if he sells the *quasi-servient* part, those easements will not be reserved by implied grant: if the *quasi-easements* had legal existence, as easements, before the unity of ownership, and the *quasi-dominant* tenement is sold, the purchaser, as in the other case, will become entitled to the easements, but what would be the result if the *quasi-servient* tenement is sold is apparently an open question, now that the authority of *Pyer v. Carter* is so much shaken; for Lord Westbury did not extend his judgment in *Suffield v. Brown* to this point, but in all probability it would be said that the grantor could not derogate from his own grant, and that, as he sold the *quasi-servient* tenement without making any stipulation for the reservation of the extinguished easements, it would be in derogation of his grant if he could claim them; it might also be said that, as the vendor made no mention of the easements in his deed, he must be presumed to have intended not to reserve them. Should this be so decided, it would make no difference whether the *quasi-easements* were first used during unity of ownership, or legally existed as easements before the ownership was united.

THE AMERICAN AUTHORITIES

on this subject of grants of *quasi-easements*, upon the conveyance of one of two lots, in or upon one of which the owner of both has imposed some specific use for the benefit of the other, while he owned both, seem to range themselves under several distinct classes, the decisions in which are tolerably consistent, although all the dicta in them may not be.

1. The first class consists of those where the grant is of some estate, described generally, and not by specific metes and bounds, as "of a mill," a "mill privilege," "my dwelling-house," and the like; in such cases all the parts and parcels of the mill, mill privilege, or house, pass with the mill, &c., as a portion of the same, although such portions may extend into, over, or under the remaining land of the grantor. They are not "easements" over such remaining land, because the same person owned both estates; they are not "appurtenances," in a proper legal sense, for a similar reason; and

they do not, therefore, pass merely under those words, but rather as part and parcel of the thing conveyed; and so would equally pass, although there were used in the deed no such words as "with all easements," or with all the "privileges and appurtenances." It is on the same principle that under a grant of "a house," or "a mill," the land under it passes, though nothing be said of land in the deed.¹

For a similar reason, if A. owns two adjoining houses, with one of which a coal cellar has long been used, but which is in fact under the other, a grant of the first by *general words* may also pass the cellar within the boundaries of the other.²

And probably the old case of *Nicholas v. Chamberlain*, Cro. Jac. 121, really proceeded upon the ground not of an easement or an incorporeal hereditament, but because the whole of the conduit through which the water ran was a corporeal part of the house, just as in many old cities there are cellars projecting under other houses. The court seem to have thought it was not merely the right to the passage of water, but that the *conduit itself* passed as part of the house, just as a flue passing through another man's house.³

2. The second class of cases is those where the *quasi*-easement or privilege, as used by the grantor, is actually "necessary" for the use and enjoyment of the estate granted; and here all agree that the grantee takes the right to continue to use the remaining grantor's premises for the benefit of the estate conveyed, in a reasonable way and manner; of which the mode of user by the grantor himself while he owned both estates would be pertinent, but perhaps not conclusive, evidence. And this rule is universally agreed to, whether the easement claimed be a visible and obvious one, *i. e.*, continuous and apparent, or the opposite, as in the case of a way, or

¹ This familiar principle was recognized in the following, among many other American cases: *Whitney v. Olney*, 3 Mason, 280.

² See *Press v. Parker*, 2 Bing. 456, better reported in 10 Moore, 158.

³ See the opinion of Lord Justice James in *Wheeldon v. Burrows*, 28 Weekly Rep. 200. To the same class of cases also belong *Riddle v. Littlefield*, 53 N. H. 503; *Comstock v. Johnson*, 46 N. Y. 615; *Voorhees v. Burchard*, 55 N. Y. 98; *Blaine v. Chambers*, 1 Serg. & Rawle, 169; *United States v. Appleton*, 1 Sumn. 492; *Doyle v. Lord*, 64 N. Y. 432.

right of passage. Necessity makes no distinctions of this kind. And this rule applies equally in favor of a *grantor*, who impliedly retains a right to use such *quasi*-easements over the estate granted, and in favor of that retained, unless it be absolutely inconsistent with the known use and object of the grant, as where it is intended to be entirely covered by a building, &c.¹

The case of *Thayer v. Payne*² furnishes an excellent illustration of this point. There the owner of two adjoining lots, from one of which a drain was then constructed through the other, sold the former, without any mention of the drain, retaining the latter; and it was held that the deed itself, even without any words of "privileges and appurtenances," carried with it a right to continue the drain, if necessary to the beneficial enjoyment of the estate granted, and another drain could not be conveniently built by reasonable labor and expense.

3. The third class of cases is where the *quasi*-easement claimed by the grantee is not really "necessary" for the enjoyment of the estate granted, but is highly convenient and beneficial therefor; and here the modern rule in America is that if such easement is "continuous and apparent" at the time of the grant, it passes to the purchaser with his estate; otherwise not.³ Thus, where A. sold one of two lots, the windows in a building on one of which overlooked the yard of the other, with shutters swinging out over it, and fire-escapes leading into it, and retained such other lot, and subsequently sold it to a third party, the latter would take subject to the obvious right of the first grantee to the easement in the yard.⁴

The leading case in America, perhaps, in support of the

¹ Seeley v. Bishop, 19 Conn. 128. This rule is also uniformly agreed to. See *Brigham v. Smith*, 4 Gray, 297; *Collins v. Prentice*, 15 Conn. 39; *Pingree v. McDuffie*, 56 N. H. 306.

² 2 Cush. 327. See *Culverwell v. Lockington*, 24 Up. Can. C. P. 611.

³ See *Fetters v. Humphreys*, 3 C. E. Green, 260; 4 Ib. 471; *Standiford v. Goudy*, 6 W. Virg. 364; *Oliver v. Hook*, 47 Md. 301; *Lanier v. Booth*, 50 Miss. 410; *Collier v. Pierce*, 7 Gray, 20; *Denton v. Leddell*, 23 N. J. Eq. 67; *Harris v. Smith*, 40 Up. Can. Q. B. 33, a very elaborate case on this point.

⁴ See *Havens v. Klein*, 51 How. Pr. R. 82.

doctrine of the conveyance of what are here called *quasi-easements*, upon a sale of part of an estate, is that of *Lampman v. Milks*.¹ There a man owned a tract of forty acres, through a corner of which, about half an acre, a small brook naturally flowed, but the owner diverted it from its natural course so that it flowed through an artificial channel in a different direction to a larger stream. Ten years after such diversion he sold the half-acre lot to the plaintiff, who erected a house upon it; and subsequently sold the balance to the defendant with the stream running in its artificial channel, and four years afterwards the defendant dammed up the entrance to the artificial channel and caused the stream to return to its original bed and overflow the plaintiff's house lot, and it was held the second purchaser could not thus return the water into its old channel.² *Phillips v. Phillips*³ inclines in the same direction. There a father orally divided his farm among his three sons, retaining the homestead for his own residence. Each son took possession, and had exclusive occupation of the portion allotted to him. From one of them a way was laid out over the homestead, and used for many years as the most convenient way for that son to church, to mill, the coal bank, and the neighboring village. It passed near the father's house, and was used by him either for hauling fuel to his house or in going to his son's residence, and was fenced out into a lane. After many years the father died, leaving by will to his three sons the portions occupied by them, and the homestead to his widow for life; and soon after the way was barred up, but it was held the right of way, *though not a necessity*, passed by the will, "either as appurtenant or as parcel of the property" as finally devised to the son occupying it.⁴

¹ 21 N. Y. 505. See *Young v. Wilson*, 21 Grant, Up. Can. 144.

² And see *New Ipswich Factory v. Bachelder*, 3 N. H. 190; *Coolidge v. Hager*, 43 Vt. 9; *Seibert v. Levan*, 8 Barr, 383. *Cave v. Crafts*, 53 Cal. 135 (1878), is much like *Lampman v. Milks*. *Dunklee v. The Wilton Railroad Co.* 24 N. H. 489, contains an elaborate judgment in support of this view.

³ 48 Penn. St. 178 (1864).

⁴ And *Thompson v. Miner*, 30 Iowa, 386, is much like *Phillips v. Phillips*. See, also, as favoring the same view, *Kieffer v. Imhoff*, 26 Penn. St.

4. The fourth class is those where the *grantor* himself claims such right, by "implied reservation," over the estate granted. And here the prevailing rule seems to be that although the alleged easement be both continuous and apparent, yet if it be not "necessary," it will not be implied in favor of the grantor and against the grantee, since that would allow the grantor to derogate from his grant. Therefore, if a mill owner sells a portion of his land which is in fact then flowed by his dam, but without any reservation of a right to continue so to flow, he does not retain such right by implication;¹ even though he would give it by implication, had he sold the mill and retained the dam; but even this last proposition is not universally admitted.

The question thus arises, as is seen in two classes of cases, one where the right is claimed by a grantee over other remaining land of the same grantor, and one where the right is claimed by a grantor over the estate granted, for the benefit of his remaining land. Possibly by the English law there may be a difference in the two cases, but it is not clear that any difference in principle should exist. If there be any difference, it is that a reservation in favor of a grantor will be implied only when the easement is actually necessary for the part retained; while it may exist in favor of the grantee and over the remaining land of the grantor, when actually used with it before the severance, and when highly convenient for its full beneficial enjoyment, though not actually necessary.²

Perhaps the leading case in America, decided after *Pyer v. Carter*, and in which that decision was not approved, is *Carbrey v. Willis*.³ There one Blanchard owned two adjoining estates on or near High Street, in Boston, on one of which was an old house, with an underground drain extending 438; *McCarty v. Kitchenman*, 47 Penn. St. 239; *Pennsylvania Railroad Co. v. Jones*, 50 Penn. St. 417; *Overdeer v. Updegraff*, 69 Penn. St. 111; *Cannon v. Boyd*, 73 Penn. St. 179.

¹ See *Burr v. Mills*, 21 Wend. 289; *Preble v. Reed*, 17 Me. 169. And see *Manning v. Smith*, 6 Conn. 289; *Plimpton v. Converse*, 42 Vt. 712; *Johnson v. Jordan*, 2 Met. 234; *Leroy v. Platt*, 4 Paige, 77.

² See *Dillman v. Hoffman*, 38 Wis. 572.

³ 7 Allen, 364 (1863).

through the other, which last, Blanchard, in 1812, conveyed by deed to R. in the usual form, with general covenants of warranty and freedom from incumbrances, which title became vested in the defendant Willis as early as 1821. In 1815, three years after his first conveyance, Blanchard conveyed the house to which the drain was connected to other parties, and the question was whether anything was excepted from the grant to R. in 1812, and which continued to form a part of the estate still retained by the grantor. And the court held that where the grant of one estate precedes that of the other, no easement can be considered as reserved by implication, unless it is *de facto* annexed and in use at the time of the grant, *and is necessary to the enjoyment of the estate which the grantor retains*. And such necessity cannot be deemed to exist, if a similar privilege can be secured by reasonable trouble and expense. See pp. 368, 369. This last suggestion seems to be quite opposed to the rule laid down in *Pyer v. Carter*, with reference to which the learned judge says: "The terms of the deed are not given in the report of that case, and the decision may perhaps be supported on the ground that the conveyance was of part of a house, having obvious existing relations to and dependencies upon the other part of the building. As in the grant of a messuage, a farm, a manor, or a mill, many things will pass which have been used with the principal thing, as parcel of the granted premises, which would not pass under the grant of a piece of land by metes and bounds. In such cases it is only a question of the construction of the terms of description." And the rule of *Carbrey v. Willis* was again applied by the same court in *Randall v. McLaughlin*,¹ in which it was held that if the owner of two adjoining estates, through one of which a drain exists for the benefit of the other, conveys them both on the same day to different grantees, no right to the drain passes as an easement or appurtenance to the upper estate, unless it was necessary for the beneficial enjoyment thereof, which would not exist if an equally beneficial drain could be built with reasonable labor and expense. In fact, the principle had

¹ 10 Allen, 366 (1865).

been adopted in that State, long before, in the case of *Johnson v. Jordan*.¹ There, one William Breed owned two adjoining houses on Temple Street, Boston, and in 1804 built a drain from one lot, which he leased, through the other, which he occupied, to the public sewer. This drain was used by the occupants of both estates until 1825, when Breed's successor sold both estates, on the same day, at public auction, to different purchasers; the leased estate, from which the drain was built, to K.; and the other, through which it ran, to T. The deed to K. made no mention of the drain, nor of "privileges and appurtenances," but described it simply by metes and bounds, and the deed to T. contained no allusion to such drain, but both referred to each other, and to certain provisions in regard to light and windows, and an easement for a gutter, in favor of one or the other estate, showing that the matter of easements was in the minds of the parties. For ten years longer, the waste water from K.'s estate continued to flow through the drain in T.'s premises, without objection, when T.'s successor intentionally stopped it up; and it was held, after the most elaborate argument, that no right to the drain existed, if K., by reasonable labor and expense, could make another drain without going through the other estate. Such is now the established law of Massachusetts.² It has also been followed and approved in Maine, after a full discussion and examination of *Pyer v. Carter*. See *Warren v. Blake*,³ which was a case of two simultaneous conveyances. Still more positively is it asserted in *Dolliff v. Boston and Maine Railroad*,⁴ that a right of drainage through a grantor's remaining land does not pass by implication, although a drain has been constructed through such land, and is in actual use, though not apparent, at the time of the conveyance, unless such right is clearly necessary to the beneficial enjoyment of the estate conveyed; and it is not necessary, if a new drain can be constructed at an expense of one hundred and seventy-five dollars.

¹ 2 Met. 234 (1841).

² See *Parker v. Bennett*, 11 Allen, 391; *Russ v. Dyer*, 125 Mass. 291.

³ 54 Me. 287 (1866).

⁴ 68 Me. 173 (1878).

In New York, also, it has been held that if *Pyer v. Carter* extends any farther than to cases where a drain is necessary to both the house conveyed and the house retained, and this arrangement is *apparent* and obvious to an observer, "it is not in accordance with the current of authorities." *Butterworth v. Crawford*¹ was also a case of a drain, from a privy vault, under the division line between the two estates, Nos. 83 and 85, on a street in New York city, owned by the same person. The owner of both conveyed to the defendant without reservation lot 85 through which the drain from the vault extended, retaining the other, No. 83, for a short time, and then conveyed it to the plaintiff; after which the defendant, not knowing of the existence of the drain, and there being nothing to indicate its existence, cut off the drain, in building on his own land; and it was held he was not liable to the purchaser of lot No. 83, chiefly on the ground that the easement was not *apparent* at the time of the grant.²

In New Jersey, also, it has been distinctly held that discontinuous easements, not constant and apparent, as rights of way, are created by a severance of tenements, only when they are necessary; a necessity that cannot be obviated by a substitute on or over the estate claiming the easement.³

Since the last English edition of this work, this subject has been much discussed in England, and it has been distinctly held, notwithstanding the cases of *Pyer v. Carter*, and *Watts v. Kelson*, that although an easement be both continuous and apparent, there is no implied reservation of it, upon the severance of two tenements, unless it be also an easement of necessity.⁴

¹ 46 N. Y. 353 (1871).

² See, also, the recent important case of *Parsons v. Johnson*, 68 N. Y. 62 (1877).

³ *Fetters v. Humphreys*, 2 C. E. Green, 260 (1867). And see *Stuyvesant v. Woodruff*, 1 Zab. 133; *Brakely v. Sharp*, 1 Stockt. 9; 2 Ib. 206. So in Rhode Island, *Evans v. Dana*, 7 R. I. 306; *Providence Tool Co. v. Corliss Steam Engine Co.* 9 R. I. 564; *O'Rorke v. Smith*, 11 R. I. 263.

⁴ *Wheeldon v. Burroughs*, 27 Weekly Rep. 115; 12 Ch. Div. 31. There A. conveyed a part of his land to B., retaining the rest, but without any reservation of a right to light and air. Subsequently he sold the adjoining

ACQUISITION OF EASEMENTS BY VIRTUE OF AN ACT OF PARLIAMENT.

The next mode by which easements may be acquired is under, or by virtue of, the provisions of an ACT OF PARLIAMENT. Some observations have already been made in the early part of this chapter on this mode of acquiring easements, and a doubt was expressed whether an easement acquired under, or by virtue of, an act of parliament, is not in the eye of the law acquired under an implied grant presumed to have been made by the owner of the servient tenement in favor of the dominant owner. Without discussing this point more fully, it is sufficient for the purpose of this treatise to consider the acquisition of easements under an act of parliament as a distinct mode by which they may be gained.

Easements may be acquired under an act of parliament, not only by the express terms of the act, as in cases where a severance of surface land from the subjacent mines is created by act of parliament, and a right is expressly given to the mine-owner to dig through the surface to obtain the minerals, and carry them, when gained, over the land, or in the case of the Railways Clauses Act, 1845, which gives a general power for all persons to run engines and carriages over a railway,^m but they may be also given by the act by implication, according to its apparent intention; thus, in the case of *Bishop v. North*,ⁿ a canal act gave power to mine-owners, if they should find it expedient, to make any railways or roads over the intermediate land of strangers from their mines to the canal, and it was held that the power to make *any* railways was not to be limited to that class of railways known when the act was

lot retained to C., who claimed a right of light over B.'s lot, but which, in the opinion of the court, was not an easement of necessity. This was affirmed in the court of appeal. 28 Weekly Rep. 196.

^m See *The Powell Duffryn Steam Coal Company v. The Taff Vale Railway Company*, L. R. 9 Ch. App. 331; 43 L. J. Ch. 575.

ⁿ 11 M. & W. 418; 12 L. J. Exch. 362.

passed, but that it was the intention of the act to authorize the making of such railroads as should from time to time be found necessary, and that power was given by implication to use locomotive engines thereon, although those machines were unknown when the act was passed.

The acquisition of an easement under the provisions of an act of parliament may happen immediately on the passing of the act, or it may be dependent on the happening of a particular event or the performance of a particular act. It is unnecessary to quote instances of acquisition of easements immediately on the passing of acts of parliament, and but few will suffice to exemplify the conditional grant of easements. The most common instances of acquisition of easements by virtue of an act of parliament on the happening of a particular event subsequently to the passing of the act, are cases of the making of inclosure awards under inclosure acts, by means of which easements are given to allottees of land over the allotments of other persons.^o Many other instances may arise, and the case of *The Glamorganshire Canal Navigation Company v. Blakemore*^p may be cited. In that case water was accustomed to flow from a river through an artificial watercourse to a mill, and an act of parliament was passed to enable a company to make a canal, and to supply it with water taken from the river. To protect the mill from damage from loss of water, it was ordered that a weir should be made, but no provision was made in the act to regulate the height or width of the weir. It was decided in the action that the effect of the act was to apportion the water between the canal and the mill-stream, the quantities for each to be determined by the act of the company in making the canal and weir, so that the respective rights in the water of the owners of the canal and

Grant under a statute immediate or conditional.

^o *Sharpe v. Hancock*, 13 L. J. C. P. 138; 7 M. & G. 354; *Rowbotham v. Wilson*, 8 E. & B. 123; 27 L. J. Q. B. 61; 8 H. L. C. 348; 30 L. J. Q. B. 49.

^p 5 Bligh N. S. 547; 1 Cl. & F. 262; *The United Land Co. (Limited) v. The Great Eastern Railway Co.* L. R. 10 Ch. App. 586; 44 L. J. Ch. 685.

the mill were determined by the act of making and the mode of constructing the weir.

IN AMERICA,

public highways are considered "in the nature of public easements;" and as they are often, perhaps usually, laid out by public authorities, acting under a statutory power, they furnish another illustration of easements acquired by statute, not mentioned by the author. That such ways are treated as easements, the landowner retaining the fee of the soil, and the public acquiring only the right of passage, and the incidental right to use the materials on the way laid out, for the purpose of keeping it in repair, is familiar and well settled law.¹

So, too, in many American states statutes exist authorizing the public authorities to lay out "private ways," so called, for the special benefit of some particular individual, or estate, over the land of another, and in such cases, also, the party so benefited acquires an easement by force of a statutory proceeding;² although in some states the public may also use the way so long as it exists.

And as in America the interest acquired by railroad corporations in land taken by them under their statutory power is generally only an easement,³ and not the fee of the soil (though perhaps a somewhat more extensive easement than the public acquire in a highway⁴), we have still another mode of acquiring easements under a statute not noticed by Mr. Goddard in the original work. The taking of

¹ See *Perley v. Chandler*, 6 Mass. 454; *Robbins v. Borman*, 1 Pick. 122; *Barclay v. Howell*, 6 Pet. 498; *Cole v. Drew*, 44 Vt. 49; *Adams v. Emerson*, 6 Pick. 57; *Lyman v. Arnold*, 5 Mason, 198; *Westbrook v. North*, 2 Me. 179; *Read v. Leeds*, 19 Conn. 188; *Jackson v. Hathaway*, 15 Johns. 447; *Hildreth v. Lowell*, 11 Gray, 345; *Codman v. Evans*, 5 Allen, 308.

² See *Denham v. County Commissioners*, 108 Mass. 202; *Flagg v. Flagg*, 16 Gray, 180; *Reynolds v. Reynolds*, 15 Conn. 83.

³ See *Quimby v. Vermont Central Railroad Co.* 23 Vt. 387; *Blake v. Rich*, 34 N. H. 282; *Chapin v. Sullivan Railway Co.* 39 N. H. 571; *Kellogg v. Malin*, 50 Mo. 500.

⁴ See *Brainard v. Clapp*, 10 Cush. 6; *Connecticut and Passumpsic Railway Co. v. Holton*, 32 Vt. 43.

land by turnpike companies by virtue of powers given them by statute, furnish also another instance of easement acquired by statute.¹ So of waterworks and gas companies.²

Turnpike
companies.

ACQUISITION OF EASEMENTS UNDER A DEVISE.

Easements may also be acquired under a DEVISE. There are sundry instances to be found in the reports of claims to easements created, or supposed to have been granted, by wills, but they do not demand particular notice.³ From these cases it will be seen that the rules for construction of wills, as to whether the words used are sufficient to pass, revise, or recreate easements, whether appurtenant or suspended or extinguished by unity of ownership, to a devisee, are the same as those for the construction of deeds.⁴

Acquisition
under a
devise.

ACQUISITION OF EASEMENTS BY PRESCRIPTION.

Easements may be acquired by PRESCRIPTION either as at common law or under the Prescription Act; it therefore becomes necessary to understand the common law on this subject, and the alterations which have been introduced by act of parliament. Before the year 1832, the common law alone governed this mode of acquiring easements, but in that year an act was passed by which the law was amended in some particulars of a most material character. This act, though not so named by parliament, is commonly called the Prescription Act,⁵ and by that name it is designated in this treatise.

Acquisition
by
prescription.

¹ See *Tucker v. Tower*, 9 Pick. 109; *Boston Water Power Co. v. Boston and Worcester Railroad Co.* 16 Pick. 522; *Hooker v. Utica and Minden Turnpike Co.* 12 Wend. 371; *Mahon v. New York Central Railroad Co.* 24 N. Y. 660; *Kelly v. Donahoe*, 2 Metc. (Ky.) 482.

² *Harback v. Boston*, 10 Cush. 295; *Providence Gas Co. v. Thurber*, 2 R. I. 15.

³ *Pheysey v. Vicary*, 16 M. & W. 484; *Polden v. Bastard*, L. R. 1 Q. B. 156; 35 L. J. Q. B. 92; *Whalley v. Thompson*, 1 B. & P. 371; *Pearson v. Spencer*, 1 B. & S. 571; 3 Ib. 761; *Barnes v. Loach*, 4 Q. B. Div. 494.

⁴ See *ante*, pp. 92-109.

⁵ Statute 2 & 3 Wm. IV. c. 71. See APPENDIX.

Prescription is described by Mr. Justice Blackstone¹ as meaning at common law a mode of acquiring real property, when a man could show no other title to what he claimed than that he and those under whom he claimed had immemorially used to enjoy it. The reason why the law allowed a title to be thus acquired is that if a man had (to use an old and familiar phrase) enjoyed an easement from time whereof the memory of man runneth not to the contrary, uninterruptedly,¹ — that is, without dispute, — a presumption would naturally arise that he had a right to that easement, which the owner of the servient tenement could not legally dispute, for no man would suffer another to enjoy an easement in his land if he could help it — an easement being a burden necessarily detrimental to his estate.

Nature of prescription at common law. Immemorial usage, or usage from time whereof the memory of man runneth not to the contrary, in the olden times, meant usage of which no person could show the commencement at any period; but, subsequently, the expression, “immemorial usage,” was taken to mean that the usage had not commenced later than the beginning of the reign of Richard I. In process of time, however, it became impossible to bring proofs of the existence of any usage at even this period, and the rule was adopted that usage might be presumed to have existed immemorially upon proof of its existence for a reasonable time, and the period of twenty years was at length adopted as the time after which immemorial usage might be presumed, unless any person contesting the right could prove its non-existence at some time subsequently to the reign of Richard I.² If immemorial usage was thus proved, it has been said that a pre-

Immemorial usage.

Presumption after twenty years' duration.

¹ Commentaries, Vol. II. — “Prescription is when a man claims anything because he, his ancestors or predecessors, or they whose estate he hath have had or used it all the time whereof no memory is to the contrary.” *Termes de la Ley*, 487.

¹ As to an interruption of the right, see *Sargent v. Ballard*, 9 Pick. 251; *Kilburn v. Adams*, 7 Met. 33.

² *Mounsey v. Ismay*, 34 L. J. Exch. per Martin, B., at p. 55; 3 H. & C. 486; *Gaved v. Martyn*, 34 L. J. C. P. per Erle, C. J. at 356; 19 C. B. N. S. 732.

sumption of right to an easement would arise, and as a right to an easement could only be conferred *actually* by grant, the presumption of right involved, in fact, a presumption that a grant of the right had been made by the owner of the servient estate to the dominant owner or his predecessors in title, and as the deed of grant could not be produced, that it had been accidentally lost or destroyed. It follows from this that the whole theory of prescription depends upon the presumption of a grant having been made; if, therefore, it can be shown that no grant could have been legally made, or that any easement lawfully created must have been subsequently extinguished by unity of seisin or otherwise, or if it can be shown to be a very improbable thing that a grant ever was made, the presumption cannot arise, and the title by prescription fails."

PRESCRIPTION IN AMERICA

depends mostly upon common law principles, not being generally provided for by special statutes, as in England; and the local statutes being resorted to merely for the purpose of aiding the court by analogy in fixing the period or length of time the use must continue; and this is somewhat different in the various states. Such statutes being made expressly applicable only to adverse possession of real estate, they influence the period of prescriptive enjoyment only by inducing the courts to adopt similar periods in cases of prescription. And without minutely stating here the local statutes of limitation as to adverse user, it may be safely asserted that no less period will suffice, and no greater will be required in fixing the requisite length of enjoyment to gain a right to an easement in land by prescription, than to acquire the land itself by adverse occupation. This element of duration is therefore comparatively simple. It is the other qualities which give rise to the most litigation. For not only must the enjoyment be sufficiently long continued, but it must also be

" The various modes by which a prescriptive title may be rebutted on the ground of impossibility of presuming a grant will be pointed out hereafter.

adverse, continuous, open, peaceable. In the words of Bracton,¹ the enjoyment must be “*longus usus, nec per vim, nec clam, nec precario.*” It must be *adverse*, and under Must be adverse. a claim of a legal right so to do, and not by the consent, permission, or indulgence, merely, of the owner of the alleged servient estate. This is obvious, where the consent, permission, or license, is expressly given; either gratuitously or for a compensation.² But it is no less true where the permission or license is *implied*, as it often may be from the facts and circumstances under which the use was enjoyed, the infrequency of its actual enjoyment, the little injury, if any, its enjoyment was causing the other party, the open and *quasi* public situation in which the land was for the time being left by its owners.³ All these, and many other circumstances, may tend to satisfy the jury — for whom the question always is ⁴ — that the enjoyment was “permissive,” and if so, it can never ripen into a right, however long continued. For instances in which this permission has been inferred from the circumstances, see the cases cited in the note.⁵

By “claim of right” is not meant, however, that the party using the easement must have *declared* he used it as of right.⁶ If he used it a sufficient time, openly, etc., without saying anything, a jury would be warranted in inferring he did so under a claim of right, and that the same was adverse, unless some special circumstances existed to give it a permissive character; which inference would be strengthened if such use

¹ Folio 222 b.

² See *Crounse v. Wemple*, 29 N. Y. 542; *Smith v. Miller*, 11 Gray, 145; *Walkins v. Peck*, 13 N. H. 360; *Chestnut Hill, &c. Co. v. Piper*, 77 Penn. St. 433.

³ See *Bradley Fish Co. v. Dudley*, 37 Conn. 136.

⁴ *Putnam v. Bowker*, 11 Cush. 542.

⁵ *Kilburn v. Adams*, 7 Met. 33; *First Parish in Gloucester v. Beach*, 2 Pick. 60, note; *Gowen v. Philadelphia Ex. Co.* 5 Watts & Serg. 141; *First Parish in Medford v. Pratt*, 4 Pick. 222; *Harper v. Parish of the Advent*, 7 Allen, 478; *Burnham v. McQuestein*, 48 N. H. 446; *Plympton v. Converse*, 44 Vt. 166; *Donnell v. Clark*, 19 Me. 183; *Thomas v. Marshfield*, 13 Pick. 240; *Bachelor v. Wakefield*, 8 Cush. 243.

⁶ *Blake v. Everett*, 1 Allen, 248.

was really injurious or inconvenient to the landowner, and inconsistent with his own absolute property in the estate;¹ and in such cases, probably, the presumption is that the use was adverse and of right, and not by permission. The enjoyment, therefore, must not only be under a *claim* of right, but it must be one which the owner of the alleged servient tenement could have prevented, or interrupted by some means, either by suit at law, or act *in pais*. If he could not thus prevent the continued use made of his premises, it would be a misuse of language to call the possession or enjoyment "adverse" to him.² Indeed, it is absurd. The principle that a user, or practice, which is neither physically preventible by the owner of the alleged servient tenement, nor actionable by him, cannot, however long continued, furnish the foundation of an easement, is forcibly illustrated by the very recent case of *Sturges v. Bridgman*, in the English Court of Appeal.³ There a confectioner had for more than twenty years used large mortars in his building, which abutted on the garden of a physician. Subsequently the physician built a consulting room in his garden, immediately adjoining the confectioner's premises, the walls being in contact; and the noise and vibration from the continued use of the confectioner's mortars caused a vibration and annoyance to the physician, and he brought an action for injunction. The defendant claimed a right by long use to continue to use his mortars as before; but it was held by the master of the rolls, and by the Court of Appeal, that no such right could be thus acquired, either at common law or under the Prescription Act.

The other qualities of a prescriptive easement are not less essential than that just mentioned, but they are fully treated

¹ See the able opinion in *White v. Chapin*, 12 Allen, 516; *Garrett v. Jackson*, 20 Penn. St. 331; *Pierce v. Cloud*, 42 Ib. 102; *Hammond v. Zehner*, 21 N. Y. 118.

² *Parker v. Foote*, 19 Wend. 309; *Sturges v. Bridgman*, 11 Ch. Div. 852; *Pierre v. Fernald*, 26 Me. 442; *Webb v. Bird*, 10 C. B. N. S. 268; *Angus v. Dalton*, L. R. 3 Q. B. Div. 85: especially the able opinion of Cockburn, C. J.; *King v. Miller*, 4 Halst. Ch. 559; *Chasemore v. Richards*, 7 H. L. C. 349.

³ 11 Ch. Div. 852 (1879).

hereafter in this chapter, both at common law and under the Prescription Act. In America, the prevailing rule is that if all the essential elements or qualities of a prescriptive right exist, the presumption of a grant is *conclusive*, and the prescriptive right cannot be overthrown by proof that in fact no grant was ever made. The facts themselves constitute a legal title, as perfect and conclusive as the production of an actual deed or grant would do.¹ And this is so, even though it be proved or admitted that the user commenced by an actual and avowed trespass,² or under an imperfect and unexecuted grant of the same ;³ or under a parol gift.⁴

The above is the common law on the subject of prescription, and it will readily be seen that the difficulty of establishing a title by prescription at common law was often very great. This being so, a new method of claiming easements by means of an imaginary grant, which, after twenty years' undisputed enjoyment, was presumed to have been made and lost, was invented, and this device, which has already been explained, was substituted for the old method of claiming by prescription.

THE PRESCRIPTION ACT.

With a view, however, of removing the difficulties in the way of establishing prescriptive titles, the Prescription Act^w was passed in the year 1832, and in the first section it recites that, "whereas the expression 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the com-

¹ Wallace v. Fletcher, 30 N. H. 434 ; Tracy v. Atherton, 36 Vt. 503 ; Borden v. Vincent, 24 Pick. 303 ; Hill v. Crosby, 2 Pick. 466 ; Coolidge v. Learned, 8 Pick. 504 ; Gayetty v. Bethune, 14 Mass. 49 ; Sargent v. Ballard, 9 Pick. 255.

² Sibley v. Ellis, 11 Gray, 417.

³ Bolivar Man. Co. v. Neponset Man. Co. 16 Pick. 241.

⁴ Legg v. Horn 45 Conn. 415.

^w See APPENDIX, where the act will be found.

mencement of such enjoyment, which is in many cases productive of inconvenience and injustice, for remedy thereof be it enacted," &c. The enacting part of the first section of this act relates exclusively to rights of common and other *profits à prendre*, with which this treatise has no concern.

By the second section it is enacted, "that no claim which may be lawfully made at the common law by custom, prescription, or grant to any way or other easement, or to any watercourse, or the use of any water to be enjoyed or derived upon, over, or from any land or water of our said lord the king, his heirs or successors, or being parcel of the duchy of Lancaster or of the duchy of Cornwall, or being the property of any ecclesiastical or lay person or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated: and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

Section 2.
Ways,
water-
courses,
and other
easements.

By the third section it is enacted, "that when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Section 3.
Light.

The above-quoted sections are the only two which prescribe the length of user requisite for acquisition of prescriptive

titles to easements under the act. There are other sections which will be noticed hereafter, which relate to the mode of computing the periods; but before noticing these it is desirable to ascertain what are the easements to which the act refers, and how the act affects prescription at common law.

In the first place it will be remarked that the second section relates not only to easements which may be acquired at common law by grant and prescription, but also to those which may be acquired by *custom*. Some remarks have already been made on the subject of customs, when the distinction between easements and customs was pointed out, and when it was shown that though customs are not easements, easements may be acquired under and in accordance with local customs. To these remarks attention is now directed.^x

The first class of easements, of which mention is made in the second section of the act, is rights of way. This "Way," can only refer to private rights of way, for it has already been shown that public rights of way are not easements, and the law of prescription does not apply to rights of a public character.

After mentioning ways, the same section next speaks of "other easements," and this phrase has given rise to much debate. A case in which the meaning of the act by this expression was considered is *Webb v. Bird*,^y which was an action brought by the owner of a windmill against a neighboring landowner, who, by building, obstructed the wind from flowing to the mill. A right was alleged to the benefit and advantage of the streams and currents of air and wind which had used to pass, run, and flow to the mill from the west. It was held that no right of this kind could be acquired under the act, even if it could have been gained by prescription at common

^x See *ante*, chapter I. p. 18.

^y 10 C. B. N. S. 268; 30 L. J. C. P. 384; in Exchequer Chamber, 13 C. B. N. S. 841; 31 L. J. C. P. 335; *Mounsey v. Ismay*, 3 H. & C. 486; 34 L. J. Exch. 52.

law. It was observed, in the course of the argument, by Erle, C. J., that the easement claimed was not a way or other easement to be enjoyed or derived "upon, over, or from any land," and that all the easements mentioned in the second section of the act are something to be enjoyed upon the surface of the land. In his judgment the same learned judge explained the meaning of the act in these words: "It appears to me that this section was not intended to give a right after twenty years to every sort of enjoyment which may be classed under the general term easement, but that it was meant to apply only to the two descriptions of easement therein specified, *i. e.* the right to a way or watercourse which may be enjoyed or derived 'upon, over, or from any land or water.' I do not think the passage of air over the land of another was or could have been contemplated by the legislature when framing that section. They evidently intended it to apply only to the exercise of such rights upon or over the surface of the servient tenement as might be interrupted by the owner if the right were disputed. It is clear to my mind that that was the intention of the legislature, because the section provides that the claim shall not be defeated where there has been actual enjoyment for the period mentioned 'without interruption.'² I am at a loss to conceive what would be an interruption of such a right as is here claimed. In the case of a way the exercise or enjoyment of the right may be interrupted by the erection of a gate or other impediment. So of the analogous right to water. So a claim to lights may be obstructed or interrupted by the erection of a hoarding or other screen by the owner of the servient tenement. But I am utterly unable to see how the access of currents of wind and air to a mill, which is necessarily so constructed as to present its face to whatever quarter the wind may blow from, could possibly be interrupted. Suppose the same individual to be the owner of all the land round the mill beyond a radius of twenty or twenty-five yards, must he, in order to prevent

² The words "without interruption" mean without interruption by some reasonable means. *Arkwright v. Gell*, 5 M. & W. 203; 8 L. J. N. S. Exch. 201.

the acquisition of a right by the owner of a mill, build a wall all round it? I am clearly of opinion that the second section of the statute meant to include only such easements upon or over the surface of the servient tenement as are susceptible of interruption by the owner of such servient tenement, so as to prevent the enjoyment on the part of the owner of the dominant tenement from ripening into a right." Mr. Justice Byles said: "I entirely agree with my lord that the words 'or other easement' in the second section of the statute mean any other easement *ejusdem generis* with a way, — something that is to be exercised upon or over the soil of the adjoining owner, more especially as it is clear, from the next section, that they exclude the easement of the access of light."

For the reasons mentioned in these judgments, it would seem that a right to support, among others, is not an easement. Support. "easement" within the meaning of the second section of the act, and probably it would be so determined now if the point were raised; but in the case of *Partridge v. Scott*,^a the court appeared to be of opinion that a right to support is ordinarily within the meaning of the section, though the right claimed could not be so established in that particular case. But it has recently been distinctly held that a right to support for a building, although in one sense an easement, and not a natural right of property, is not an "easement" within the Prescription Act.¹

Pollution of air may undoubtedly be resisted by reasonable means—that is, by bringing an action for damages or for an injunction; but still a right to pollute the air is not at all analogous to a right of way or a right to a watercourse: it is not a right to be exercised "upon or over the surface of the servient tenement," according to the foregoing interpretation of the statute; and therefore, in accordance with the judgments in *Webb v. Bird* above cited, such a right is not an "easement" within the meaning of the act; but yet it seems, on several occasions, to have been so considered,

^a 3 M. & W. 220; 7 L. J. N. S. Exch. 101; *Hide v. Thornborough*, 2 Car. & K. 250.

¹ *Angus v. Dalton*, 4 Q. B. Div. 162.

for in *Bliss v. Hall*^b it was held that the common law right to purity of air remained until an adverse right to pollute it had been acquired by user for twenty years; and in *Flight v. Thomas*,^c in which a right to pollute air was claimed under the second section of the act, it was said that to establish the right, the polluting smells must be shown to have passed to the plaintiff's land for twenty years. A similar decision was given by Lord Romilly, M. R., in *Crump v. Lambert*,^d in which case his lordship said: "It is true that by lapse of time, if the owner of the adjoining tenement, which in case of light or water is usually called the servient tenement, has not resisted for a period of twenty years, then the owner of the dominant tenement has acquired the right of discharging the gases or fluid, or sending smoke or noise from his tenement over the tenement of his neighbor."

These decisions and dicta tend to create uncertainty as to the meaning of the Prescription Act, but in no case has the point been so well considered as in *Webb v. Bird and Mounsey v. Ismay*; it is very probable, therefore, that if the question were fairly raised and argued, it would be held that neither a right to support, nor a right to pollute air or create noise, to the annoyance of a neighbor, is an easement which can be acquired under the second section of the Prescription Act.

It should be stated, also, that an easement can be acquired under the second section of the Prescription Act only if it is

^b 4 Bing. N. C. 183; 7 L. J. N. S. C. P. 122.

^c 10 A. & E. 590; 8 L. J. N. S. Q. B. 337.

^d L. R. 3 Eq. 409. In this passage the master of the rolls speaks of the acquisition of a right to make a noise, to the nuisance of a neighbor, by twenty years user of the practice. It seems, however, very doubtful if any such right can be so acquired. In *Elliotson v. Feetham*, 2 Bing. N. C. 134, which was an action for nuisance by noise, and the defence was that the defendants had made the noise for ten years before the plaintiff came to his house, the court intimated an opinion that such a right might be acquired by twenty years user. In *Mumford v. Oxford, Worcester and Wolverhampton Railway Co.* (1 H. & N. 34), however, which was also an action for noise, Pollock, C. B., said: "There is a distinction between a nuisance and an easement. No right can be gained by continuing a public nuisance." And see *Sturges v. Bridgman*, 11 Ch. Div. 852.

enjoyed for a purpose contemplated by that section; thus, proof of user to turn cattle into a lane cannot establish an easement under the second section of the act, if obtaining pasturage (which is a *profit à prendre*) was the object of the user.^e

Easement
claimed to
obtain a
*profit à
prendre*.

The next class of easements mentioned in the second section of the act, is watercourses. It may be remarked that the word watercourse is commonly used to designate both the bed or channel in which a stream flows, and also the stream of water as it flows in the channel; but it seems that it can be correctly used to designate the former only, and speaking of the stream itself, or the body of moving water, as a watercourse, tends rather to confusion. In the Prescription Act, the word appears to relate to the moving water of streams.

In *Wright v. Williams*^f it was determined that the word “watercourse” in the act includes a right to pour water over the land of another person, and that case, as well as *Carlyon v. Lovering*,^g shows that a right to pollute the water of streams by pouring in filthy matter or rubbish, is also a right to a watercourse within the meaning of the act. It has also been decided that a right to have water which would have flowed down to particular land diverted so as to prevent its coming there is a right to a watercourse under the act.^h

The use of water is the only remaining easement mentioned in the second section of the act. A right to take water has already been shown to be an easement, and not a *profit à prendre*.ⁱ

It will be observed that the words of the third section of the Prescription Act, which refer to rights to light, only, differ materially from those of the second section. It will be shown hereafter that the effect of this pecul-

Light.

^e *Bailey v. Appleyard*, 8 A. & E. 161; 7 L. J. N. S. K. B. 145.

^f 1 M. & W. 77; 5 L. J. N. S. Exch. 107.

^g 1 H. & N. 784; 26 L. J. Exch. 251.

^h *Mason v. Shrewsbury and Hereford Railway Co.* L. R. 6 Q. B. 578; 40 L. J. Q. B. 293.

ⁱ See *ante*, chapter I. p. 7.

iar form of words is to place the acquisition of rights to light by prescription upon a totally different footing from the acquisition of other easements under the second section, but as acquisition of rights to light will be separately considered hereafter, this matter is reserved for another place.^j

There is one point, however, in which the words of the third section of the statute are the same as those of the second; in each the easement is required to have *Actual enjoyment.* been “actually” enjoyed for the full period named, without interruption, and this requisition gave rise to a peculiar contention in the case of *Flight v. Thomas*,^k which was carried to the House of Lords. Light, in that case, had been enjoyed uninterruptedly for nineteen years and a part of the twentieth year: before the twentieth year expired, the enjoyment was interrupted, and the interruption was continued until the expiration of the twentieth year, when an action was brought by the claimant of the right against the obstructor, and the question was whether an easement had been acquired. It is clear that when the obstruction first commenced, no action could have been maintained, for there had not been twenty years’ enjoyment of the light, and no right had been acquired. When the twenty years had expired, and the action was brought, it was urged by the obstructor that no right had been acquired, for that the light had not been “actually” enjoyed for the full period of twenty years, without interruption, as required by the act; but it was replied that the fourth section of the act states that “no act or other matter shall be deemed to be an interruption within the meaning of the act unless the same shall have been submitted to, or acquiesced in, for one year,” and that, as the action had been commenced before the interruption had continued for one year, the use of the light must be taken to have continued, and to have been actually enjoyed, notwithstanding the interruption in fact; and this was the view taken by the court. A similar case has recently arisen in which the principle of the decision in

^j See *post*, section 2, title LIGHT.

^k 11 A. & E. 688; 10 L. J. Exch. 529; in H. L. 8 Cl. & F. 231; West, 671.

Flight v. Thomas was followed. The enjoyment, however, in that case had not even continued up to one year before the commencement of the action, but as the interruption in fact had not been acquiesced in, the prescriptive period was held to have run.¹ Though this may, perhaps, be the best interpretation of these somewhat conflicting clauses of the statute, a peculiar result follows, — namely, that for all practical purposes an easement can be acquired after only nineteen years' enjoyment, or even less, notwithstanding the act expressly requires *actual* enjoyment for the *full period* of twenty years.

Except in the case of rights to light, the Prescription Act does not preclude easements being claimed and acquired by prescription at common law;^m it is therefore a common practice, when it is doubtful whether the evidence in a cause will support a claim under the act, to claim an easement by immemorial enjoyment, as well as under the act. It has been determined, however, that in the case of a right to light, the act, owing to the peculiar wording of the third section, has had the effect of abolishing the common law title by prescription and establishing that such right can now be acquired only by prescription, under the statute. In his judgment in the House of Lords in the case of *Tapling v. Jones*,ⁿ the Lord Chancellor (Lord Westbury) said that the right to what is called an "ancient light" now depends upon positive enactment; that it is matter *juris positivi*, and does not require and therefore ought not to be vested on any presumption of grant or fiction of a license having been obtained from the adjoining proprietor. His lordship thought that it would be found that error in some decided cases had arisen from the fact of the courts treating the right as originating in a presumed grant or license. It will be

¹ *Glover v. Coleman*, L. R. 10 C. P. 108; 44 L. J. C. P. 66. Acquiescence in an interruption, and what is sufficient to negative the idea of acquiescence will be considered later in this chapter.

^m *Holford v. Hankinson*, 5 Q. B. 584; 13 L. J. Q. B. 115. *Aynesley v. Glover*, L. R. 10 Ch. App. 283; 44 L. J. Ch. 523. In this decision, which related to a right to light, the lords justices made no distinction between rights to light and other easements in this respect.

ⁿ 11 H. L. C. 290; 34 L. J. C. P. 342.

remarked that the concluding part of the second section of the act is similar to the third section, and enacts that when ways, or the other easements mentioned in the earlier part of the section, have been enjoyed by any person claiming right thereto, without interruption, for the full period of forty years, the right thereto shall be deemed absolute and indefeasible. It therefore seems to follow, for the reason given by Lord Westbury, that the effect of that clause is to render easements of way, watercourse, and use of water, which have been enjoyed by any person claiming right thereto, for the full period of forty years, incapable of being claimed by prescription at common law.

A point which naturally suggests itself for consideration is, that as the user of a future easement in the land of the servient owner must necessarily be an illegal act, and a trespass until the period of prescription is completed, the servient owner may sue for the series of trespasses, although a prescriptive title has been acquired before the actions are commenced. This, however, is not so in the case of easements acquired under the Prescription Act, whatever may be the case if they are acquired by prescription at common law only. This point was raised and decided in *Wright v. Williams*,^o in which case it was determined that the statute intended to confer, after the periods of enjoyment therein mentioned, a right from their first commencement, and to legalize every act done in the exercise of the right during their continuance.

Legalization of previous user when an easement is acquired.

At common law the owner of land in fee can alone claim an easement by prescription in his own right, — all other persons must prescribe in his name, and show the derivation of their title from him,^p thus, a tenant for years must prescribe in right of his landlord, the tenant in fee.^q The Prescription Act, however, made a great alteration in this respect, for it is en-

Claims to prescriptive rights by owners in fee and occupiers of land respectively.

^o 1 M. & W. 77; 5 L. J. N. S. Exch. 107.

^p *Holback v. Warner*, Cro. Jac. 665; *Staples v. Heydon*, 2 Ld. Raym. 922; *Smith v. Morris*, Fort. 340.

^q *Large v. Pitt*, Peake Ad. Ca. 152; *Dawney v. Cashford*, Carth. 432.

acted in the fifth section, that "in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the *occupiers* of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done." It will be observed that the words of this section merely refer to the mode of pleading and claiming easements; they do not enable an occupier to acquire an easement for himself independently of the owner in fee, so that an easement acquired under the act shall expire with the occupier's interest in the dominant tenement. The easement is acquired for the benefit of the dominant tenement, and becomes appurtenant thereto into whosoever hands it passes; and the grant which is presumed to have been made in every case of prescriptive right is presumed to have been made to the owner in fee, just as it is in cases of prescription at common law, and not merely to the occupier in whose name the claim is made.

The Prescription Act, having fixed particular periods of time during which easements must have been used in order that a prescriptive title may be acquired under the act, also laid down certain rules for computing those periods, to which it is proposed now to direct attention.

By the fourth section of the act, it is enacted that "each of the representative periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been, or shall be, brought into question." The remainder of the section explains the meaning of the word "interruption" as it is used in the act, but that will be more fitly considered in another part of this chapter.

In this section it will be observed that the periods of user required by the act are expressly declared to be the periods

next before some suit or action. Some difficulty has arisen from this enactment, and it has been urged that it could not have been intended that this expression should be taken literally, but that it must have meant the periods should be computed from before the time of some *act committed adversely to the easement claimed*. It was determined, however, that the act must be construed literally.* The peculiar effect of this clause in the act is, therefore, that, however long an easement is enjoyed uninterruptedly, no prescriptive title can be acquired, unless an action or suit is commenced by the servient owner for trespass, by using the easement, or by the dominant owner, for some act by which the use of the easement, to which he had at the time really no legal right, was obstructed. The position of the dominant owner before the action is brought is explained by Parke, B., in *Ward v. Robins*,^s thus: "Such enjoyment, in order to give a right under that statute, must be, up to the time of the commencement of the suit, not up to the time of *the act complained of*; and, consequently, an enjoyment for twenty years, or more, before that act gives only what may be termed an inchoate title, which may become complete or not by an enjoyment subsequent, according as that enjoyment is or is not continued to the commencement of the suit. This apparent absurdity, arising from a strict construction of the act, has already been fully considered by this court, in the case of *Wright v. Williams*, and the literal interpretation adhered to, the court intimating its opinion that the mischief of such a construction was rather apparent than real, and the decision in that case was fully approved of, and acted upon, by the Court of Queen's Bench, in the case of *Richards v. Fry*."

Not from the commission of an adverse act.

The next point to be remarked is, that the periods are to be next before *some* suit or action, and a question arose in construing this clause, whether the act intended that user for the 'requisite period should be

Meaning of some suit or action.

* *Wright v. Williams*, 1 M. & W. 77; 5 L. J. N. J. Exch. 107; *Richards v. Fry*, 7 A. & E. 698; 7 L. J. N. S. K. B. 68.

^s 15 M. & W. 237.

shown to have immediately preceded each suit or action in which the right was brought in question, or whether it meant *any one* suit or action,—that is, either a suit or action then pending, or one in which the right had been brought in question on a former occasion. The point was argued in the case of *Cooper v. Hubbuck*,^t when Williams, J., differed in opinion from the rest of the court, he thinking that in every action the period must be proved to have been next before that particular action, but the other judges (Erle, C. J., Willes, and Byles, JJ.), being of opinion that it is sufficient if the period preceded some former suit or action.

Lastly, it is to be observed on this section that the user is required to be *next* before a suit or action; and with reference to this, it has been determined that the statute intends that actual user must be shown to have continued to within one year of the commencement of a suit or action. In the case of *Parker v. Mitchell*,^u evidence was given of user of a way from a period of fifty years till within four or five years before the commencement of the action, and it was held that this evidence was not sufficient to establish an easement. Lord Denman expressed an opinion that absence of evidence of user for two days before the commencement of the action would not prevent the acquisition of an easement, because that period is less than a year. The case was only argued on motion for a rule, which was refused, and no formal judgment was given. In *Lowe v. Carpenter*,^v the user was proved to within fourteen months of the action; and on the authority of *Parker v. Mitchell* it was decided that the evidence was insufficient. It was said by Patteson, J., at nisi prius, that the decision in *Parker v. Mitchell* was not satisfactory to his mind; but Parke, B., with the concurrence of the other judges, said that he was by no means satisfied *Parker v. Mitchell* was wrong, and that case was followed by the court. Parke, B., further said that, in his opin-

User must be *next* before some suit or action.

^t 12 C. B. N. S. 456; 31 L. J. C. P. 323.

^u 11 A. & E. 788; 9 L. J. N. S. Q. B. 194.

^v 6 Exch. 825; 20 L. J. Exch. 374. But see *Glover v. Coleman*, L. R. 10 C. P. 108; 44 L. J. C. P. 66.

ion, the true construction of the statute is that there should be some act of user within each year of the prescriptive period, and he asked, during the argument, "Was the Statute 2 & 3 Wm. IV. c. 71, intended to apply to cases where the rights mentioned in it are only used once in two years? Must there not be at least an annual user? How could a party acquiesce for one year under the fourth section if the 'act or matter' is done only once in two years?" He then observed that the form of plea under the act seemed not to apply to cases where the enjoyment is not annual. This opinion of Parke, B., would possibly not be supported if the point were fully argued and decided in a judgment.^w

It will be understood that these rules for computation of prescriptive periods apply only to cases of easements claimed under the act; to establish an easement claimed by prescription at common law it is not essential to produce evidence of user within the last year before action.^x

No such
rules at
common
law.

The sixth section of the Prescription Act enacts that "in the several cases mentioned in, and provided for, by this act, no presumption shall be allowed or made in favor or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act, as may be applicable to the case and to the nature of the claim."

Section 6.
No pre-
sumption
of user to
be made.

There are several cases which have arisen involving questions relating to the meaning of this clause. The first to which attention is directed is *Carr v. Foster*,^y which was an action for disturbance of a right of common. To rights of

^w See *Ladyman v. Grave*, L. R. 6 Ch. App. at p. 768, and *Carr v. Foster*, 3 Q. B. 581; 11 L. J. Q. B. 284. These cases indicate that user is sufficient for the acquisition of a prescriptive right, even though there were a period of non-user in the middle, provided the non-user was not in consequence of the adverse act of the servient owner, so as to constitute an interruption. There are, however, authorities to show that the user must be continuous. See *post*.

^x *Darling v. Clue*, 4 F. & F. 329.

^y 3 Q. B. 581; 14 L. J. Q. B. 284.

this kind, acquired under the first section, the sixth section of the act applies equally with easements acquired under the second and third sections, and the case is, therefore, an authority on the law relating to easements. The enjoyment of the right was proved to have continued for nearly forty years before the commencement of the action — the act in the case of commons requiring enjoyment for thirty years. It appeared, however, that about eighteen years before the action the owner of the dominant tenement, having no cattle, made no use of the right for a period of two years. It was urged, in opposition to the claim, that the act required *actual* enjoyment during the whole period, which was not proved, and that by reason of the sixth section, no presumption of enjoyment during the two years could be made; but it was held that the evidence was sufficient to support the right, Lord Denman, C. J., in his judgment, saying that: "Section six enacts that no presumption shall be made in favor of any claim, on proof of the right having been exercised for a less period than that prescribed by the act in the particular case. But that provision is meant only to encounter presumptions from an exercise of the right during such an imperfect period that it was exercised in olden times. The effect of the clause is that a claimant proving enjoyment for less than the specified time shall not, on that ground, carry back his right to a period before that which his proof extends to. But this does not affect the mode of proof, and where actual enjoyment is shown before and after the period of intermission, it may be inferred from that evidence that the right continued during the whole time." From the case of *Lawson v. Langley*,² it may be inferred that the sixth section of the act would not preclude a jury from presuming user at the commencement of the prescriptive period, if evidence were given of user a little before and again after the prescriptive period had begun to run.

The sixth section of the act, forbidding presumptions in favor of a claim to an easement, relates, of course, exclusively to the cases of easements claimed under the act. In *Bright*

² 4 A. & E. 890; 6 L. J. N. S. K. B. 271.

v. Walker,^a Parke, B., in delivering the judgment of the court, said: "Of course nothing that has been said by the court, and certainly nothing in the statute, will prevent the operation of an actual grant by one lessee to the other, proved by the deed itself, or upon proof of its loss, by secondary evidence; nor prevent the jury from taking the possession into consideration with *other circumstances*, as evidence of a grant, which they may still find to have been made, if they are satisfied that it *was made in point of fact*."

Presumption not prohibited when evidence of an actual grant exists.

A dictum of Lord Westbury's, relating to this section of the act, should be noticed before leaving the subject. His lordship is reported to have said that the meaning of the section seemed to be that no presumption or inference in support of a claim should be derived from the bare fact of user or enjoyment for less than the prescribed number of years; but that when there are other circumstances in addition, the statute does not take away from the fact of enjoyment for a shorter period its natural weight as evidence, so as to preclude a jury from taking it, along with other circumstances, into consideration as evidence of a grant.^b From the concluding words of this paragraph, it would seem that Lord Westbury intended to express the same idea as that of Parke, B., in *Bright v. Walker*, in the passage above quoted, *i. e.* that if an easement is claimed under the Prescription Act simply, no presumption of a grant, which every one knows never existed, may be made unless evidence is given of user for the full period required by the act; but that if circumstances exist from which, coupled with a certain amount of user, it may be reasonably presumed that a grant *actually was made*, the act does not forbid a presumption of such a grant having been made merely because the user by itself would have been insufficient to satisfy the statute. In a case of this kind the title to the easement is not prescriptive at all, but depends upon an actual grant.

By the seventh section of the Prescription Act, it is pro-

^a 1 C., M., & R. at p. 222.

^b *Hanmer v. Chance*, 34 L. J. Ch. at p. 416.

vided that "the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible."

Section 7.
Disability
of persons
interested
in resisting
prescrip-
tive user.

By the eighth section it is enacted that "when any land or water, upon, over, or from which any such way or other convenient watercourse, or use of water, shall have been, or shall be, enjoyed or derived, hath been or shall be held, under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such way, or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall, within three years next after the end or sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof."

Section 8.
User dur-
ing terms
of life or
years in
the servi-
ent tene-
ment.

The seventh and eighth sections of the act have a somewhat similar object — namely, the prevention of easements being acquired under the act against interested persons who are physically or legally incapable of resistance. It will be observed that the eighth section contains the peculiar phrase, "Any such way, or *other convenient water-course*, or use of water." This is evidently a mistake, and various surmises have been made as to the intention of the legislature by the enactment in question; but if the words of the section be compared with those of the second section, it may readily be conceived that the intention was to use the same words in each, and that the sentence should be read — any such way or other *easement, or to any watercourse* or use of water.

"Other
convenient
water-
course."

The seventh section of the act, at first sight, appears to be at variance with the fourth; in the latter the period is required to be next before some suit or action, but if a disability intervenes, and the time during its continuance is to be excluded in computing the period, it may happen that a small portion of the prescriptive period only can be proved to have been next before the action. This point arose in the case of *Clayton v. Corby*,^c which was an action for trespass, in answer to which a prescriptive right to dig clay was set up, claimed under the first section of the act; the replication alleged the intervention of a life estate in the servient tenement, and the question was whether evidence of user for twenty-five years before the creation of the life estate, during the life estate, and for six years after the life estate continuously down to the commencement of the action, was sufficient to establish the right. It was held that it was, for that the fourth and the seventh section ought to be read together, and that the period is required to be thirty years next before action, excluding, in the computation of those thirty years, any tenancy for life, and that the setting up of a life tenancy obliges a claimant to show thirty years' enjoyment, either wholly before the tenancy for life, if it be still subsisting at the commencement of the suit, or partly before and partly after, if it be ended.

Interven-
tion of life
estate;
computa-
tion of
period.

It will be shown hereafter that the user, to satisfy the statute, must be continuous; and it may be urged against the continuity of the enjoyment, that if a tenancy for life, or years, or a period of disability intervenes, the time during the continuance of which is excluded in the computation, the enjoyment ceases to be continuous; but this is not so, for the effect of the seventh and eighth sections is not to unite discontinuous periods of enjoyment, but to extend the period of continuous enjoyment by so long a time as the tenancy or disability continues.^d

Continuity
of period.
Exclusion
of period of
disability.

Some little doubt arose, in consequence of the decision in

^c 2 Q. B. 813; 11 L. J. Q. B. 239.

^d *Onley v. Gardiner*, 4 M. & W. 496; 8 L. J. N. S. Exch. 102.

Bright v. Walker,⁶ whether terms for life and for years ought not to be excluded under the eighth section of the act in the computation of periods of twenty as well as of forty years, although the period of forty years is alone mentioned in that section of the act. The passage which gave rise to this doubt is in the judgment of Parke, B. After quoting the section he said: "It is quite certain that an enjoyment of forty years instead of twenty, under the circumstances of this case, would have given no title against the bishop, as he might dispute the right at any time within three years after the expiration of the lease; and if the lease for life be excluded from the longer period as against the bishop, it certainly must from the shorter." The point was fully argued, however, in the subsequent case of *Palk v. Skinner*,⁷ when it was determined that the express mention of forty years excludes the twenty years' enjoyment, and shows that the section is only applicable to the period of forty years. Of the case of *Bright v. Walker* it was said by Lord Campbell, C. J., that when properly examined it appears that the Court of Exchequer was not required to give any opinion upon the effect of the eighth section, and that it was quite clear in that case that the right set up was negatived under the seventh section, and that that was the *ratio decidendi* upon which the court proceeded.

CHARACTER OF THE USER.

The above are the special rules enacted by the Prescription Act as to the duration of user required for the acquisition of easements under the act and the mode of computing the periods there mentioned; but it must always be borne in mind that the purpose of the act was merely to shorten the periods of enjoyment required for the acquisition of easements in certain cases; it was not the intention of the act to alter the *character* of prescriptive user, and the same characteristics are required

The character of the user, the same at common law and under the statute.

⁶ 1 C., M. & R. 211; 3 L. J. N. S. Exch. 250.

⁷ 18 Q. B. 568; 22 L. J. Q. B. 27.

for the user that an easement may be acquired under the act as for the user after which an easement can be acquired by prescription at common law. The act, moreover, expressly declares in the second section that all claims to easements made thereunder may be defeated in any way (except by showing that the easement was first enjoyed at some time prior to the periods therein mentioned) by which the same would have been liable to be defeated at common law. It therefore becomes essential to inquire what are the requisite characteristics for the user that an easement may be acquired by prescription at common law, and to ascertain by what means prescriptive title may be defeated otherwise than by showing the commencement of the user.

No easement can be acquired by prescription if it would be inconsistent with an actual and existing grant made by the same person from whom a grant would have to be presumed to support the prescriptive right. This proposition scarcely needs demonstration, for it is plain that if a man grants a right he cannot nullify that grant by another which is adverse to it, and therefore no such adverse grant can be presumed. A case, however, came before the Privy Council on appeal from the Isle of Man which seems to be somewhat at variance with this principle, and it is, therefore, deserving of notice. It appeared that in 1761 the respondent's predecessors in title bought of the appellant's predecessors some land on which they were to erect "a mill or otherwise an instrument wherewith to plate iron, and likewise a smithy," and the appellant's predecessors in title who retained the adjoining land, engaged to keep the water of a watercourse in the retained land "continuing to the dam that was then intended to be made at the n per end of the land for the use of the plating mill," so that it was contended that the intention was only to supply the water for the purpose of the mill while used as a plating mill and the smithy. In process of time the mill was changed and the water was used for various and varying purposes, and at length for forty years and down to 1838 for a brewery. From that date till 1849, when the bank confining the water in its course broke down,

No pre-
scription at
variance
with a
grant.

no use was made of the stream, though it still flowed to the old spot. On the bank breaking down the respondent entered the appellant's land and repaired it, when the appellant, opposing the respondent's claim of right, broke down the repaired bank again. The deed of 1761 was produced to show that the right was limited by the grant to user for a plating mill and smithy only. The Privy Council, however, thought that, whatever might have been originally intended, the user that had taken place for such a great length of time in applying the water was sufficient, under the law of the Isle of Man, to give the respondent a prescriptive right; and it was said that it must be admitted that there had been plenty of opportunity for the appellant to interfere and restrict the right, if any such right of restriction existed. It was quite clear that if the grantor had restricted the right of the use of the water to a particular purpose only, and the grantee had used it for other purposes than those mentioned in the grant, and the grantor had stopped the water from flowing there at all, he would have been justified; but as he chose to lie by for fifty years it was then too late for him to say that the right had not been acquired.⁹ It may be said to this decision that the right claimed to have been acquired by prescription was not adverse to, but rather an enlargement upon, the right originally granted by the deed, and therefore that it was not adverse to the grant, and this apparently is so, the right granted being to use the water for a plating mill, and the right claimed being to use it for all purposes, but it is clear from the judgment that the Privy Council did not decide the case upon that ground, but simply upon the ground that as the grantor did not choose to keep the user within the limits of the grant, the grant would not by itself prevent an enlarged or an adverse right being acquired by prescription.

As no easement can be acquired by prescription if it would

No pre-
scription at
variance
with a pre-
scriptive
right.

be inconsistent with an actual and existing grant made by the presumed grantor of the prescriptive right, so neither can an easement be acquired by prescription if it would be at variance with another and

⁹ *Tobin v. Stowell*, 9 Moore P. C. 71.

an existing prescriptive right. The reason for this is similar to the reason for the former proposition. To support a prescriptive right a grant must be presumed, but as a man cannot make a grant in derogation of another grant already made by him, so a grant cannot be presumed in derogation of another presumed grant. A different reason was given in Aldred's case for this, but however good that may have been, the other is sufficient. In Aldred's case,^h the Court of King's Bench determined that "when a man has a lawful easement or profit by prescription from time whereof, &c., another custom which is also from time whereof, &c., can't take it away, for the one custom is as ancient as the other: as if one has a way over the land of A. to his freehold by prescription from time whereof, &c., A. can't allege a prescription or custom to stop the said way." It has, however, been shown that an easement of an inconsistent character may be acquired *subordinate* to an easement already existing.

An easement at variance with a *natural* right can be acquired by prescription, and in this particular consists one of the points of distinction between natural rights and easements; but in order that an easement at variance with the natural rights of another person may be acquired by prescription, the user by which it is acquired must have affected the use the other has made of his natural rights, or his power to use them; for in the absence of this no presumption of a grant of the right can be implied, which it will presently be shown is essential for the acquisition of an easement by prescription.ⁱ

Prescription may be at variance with a natural right.

Whether an easement is capable of being acquired by prescription depends in every case, except in the case of claims to rights to light, whether a grant of the right in question is capable of being implied; for it must always be remembered that title by prescription is founded upon the presumption of a grant having been originally made by the owner of the servient to

Prescription possible only when a grant can be presumed.

^h 9 Coke's Rep. 58; *Spooner v. Day*, Cro. Car. 432; *Murgatroid v. Law*, Carth. 116; *Wynstanley v. Lee*, 2 Sw. 333.

ⁱ *Sampson v. Hoddinott*, 1 C. B. N. S. at p. 611; 26 L. J. C. P. 148.

the owner of the dominant estate: if, therefore, it is shown that at the time when such a grant must be presumed to have been made, in order that the claim may be supported, the grant from any cause could not have been made, no presumption of the kind can arise, and the claim will be defeated. There are a variety of ways by which this presumption can be rebutted, and these will now be considered in succession. It has already been observed that the Prescription Act, owing to the peculiar form of the third section, introduced an exception to the general rule in cases of rights to light claimed by prescription, and that that section had the effect of abolishing claims to light by prescription at common law; in addition to this it had the effect of removing the necessity for presuming a grant to support claims to rights to light by prescription under the act, for in *Tapling v. Jones*,^j in the House of Lords, it was determined that the right to light since the statute “depends upon positive enactment. It is matter *juris positivi*, and does not require and therefore ought not to be vested on any presumption of grant or fiction of a license having been obtained from the adjoining proprietor.”

No presumption of a grant of an easement claimed by prescription can be made if the easement is of such a nature that it was incapable of being the subject of a grant; but the fact that a grant of the easement would have entirely deprived the owner of the servient tenement of all the benefit of his land is not material, for it might still have been granted.^k

A grant cannot be presumed if an actual grant would have

^j 11 H. L. C. 290; 34 L. J. C. P. 342. In *Lanfranchi v. Mackenzie* (L. R. 4 Eq. 421; 36 L. J. Ch. 518), Malins, V. C., said: “Mr. Glasse has referred me to a case of *Tapling v. Jones*, and has argued that it” (*i. e.* the right to light) “now depends not on the common law, or the ancient principle, but upon the statute. I do not understand the statute to have made any difference. I only read the statute as meaning this (and I believe it has been uniformly so read), that there was no absolute period theretofore, but now the period is fixed at twenty years.” “The cases since that statute have proceeded upon the same principle as before,” &c.

^k *Carlyon v. Lovering*, 1 H. & N. 784; 26 L. J. Exch. 251.

been void by reason of an act of parliament.¹ It is not, however, essential for this purpose that the act should prohibit the grant or the easement in express terms; it is sufficient to prevent the acquisition of a prescriptive right that the grant would have been at variance with the purpose of the act. Thus, in the case of *The Rochdale Canal Company v. Radcliffe*,^m a canal had been made under the provisions of certain acts of parliament, and power was given to all mill-owners within a certain distance to supply their engines with water for the sole purpose of condensing steam, the water after use to be returned to the canal. The action was brought for taking water for other purposes than condensing, and a claim of right to use the water for those purposes was set up under the Prescription Act. It was decided, however, that the claim could not be allowed, as the company was established to make a canal for the public benefit, and when it was made, all the queen's subjects were to have the right of using it, paying toll; that it became a turnpike road, which could only be kept in repair by maintaining in it the quantity of water necessary for floating barges; that the prescription claim was a claim by supposed grant to take more water than was allowed by the act, whatever the consequences might be to the navigation; that if the company had actually made a grant of the water in the terms of the plea, such a grant would have been *ultra vires* and bad, and therefore that the right could not be acquired by prescription.

No prescription adversely to a statute.

The fact that a statute has extinguished certain easements at a particular date will not prevent the acquisition of similar easements at a future time under the Prescription Act, unless the statute also prohibited future grants of those rights. In the absence of any such prohibition, there is no reason why

¹ *Mill v. Commissioners of the New Forest*, 18 C. B. 60; 25 L. J. C. P. 212.

^m 18 Q. B. 287; 21 L. J. Q. B. 297; *Staffordshire and Worcestershire Canal Co. v. Birmingham Canal Co.* L. R. 1 H. L. 254; 35 L. J. Ch. 757; *The National Guaranteed Manure Co. v. Donald*, 4 H. & N. 8; 28 L. J. Exch. 185.

a jury may not, after the full period of user required by the act, presume a grant to have been made subsequently to the statute.ⁿ

No presumption of a grant can be made, and therefore no easement can be acquired by prescription, if the servient owner has been incapable, from any cause, of resisting the user. It is said in *Wynstanley v. Lee*,^o that the courts presume a grant in ordinary cases after long uninterrupted user, because they presume that the party against whom the right is claimed would not have abstained from exercising his right of interference, knowing that twenty years' abstinence would extinguish it, unless he intended to permit the enjoyment; if, however, the servient owner had no means of resistance, it is clear the reason for this presumption cannot exist, and the presumption cannot be made. For this cause user over the servient tenement while it is leased to a tenant, during which time the landlord is incapable of resisting, is not sufficient to raise a presumption of grant by the landlord,^p unless, indeed, the landlord, with notice of the user, has renewed the lease without taking the land into his possession and stopping the user, or without insisting on resistance by the incoming tenant.^q

So, also, if the easement is of such a nature that the user is exercised upon land not the property of the servient owner, and the servient owner has no means of resisting the user, no presumption of a grant can arise until the servient owner has sustained actual injury, and has submitted to it for the full prescriptive period. In the case of light received across the servient tenement, the servient owner has the means of resisting enjoyment, although the enjoyment is actually on land not his property, for he can build a wall or other obstacle on his own ground, and this is the course he is bound to adopt to

ⁿ *Campbell v. Wilson*, 3 East, 294; *Race v. Ward*, 7 E. & B. 384; 26 L. J. Q. B. 133; *Holden v. Tilley*, 1 F. & F. 650.

^o Per Sir T. Plumer, M. R. 2 Sw. at p. 340.

^p *Winship v. Hudspeth*, 10 Exch. 5; 23 L. J. Exch. 268; *Baxter v. Taylor*, 4 B. & Ad. 72.

^q *Bishop v. Springett*, 1 L. J. N. S. K. B. 13.

prevent a right to light being acquired. There are, however, many cases in which the servient owner cannot resist the user, because he is not the owner of the soil where the user is enjoyed. Thus, in *Blackett v. Bradley*,^r a right was claimed to have been acquired under the Prescription Act of working mines without leaving any support for the surface-land; but it was held that the right could not be so gained, inasmuch as no act had been done on the surface-land, and the landowner could not prevent the mine-owner excavating his own mines in any manner he pleased; and so, also, in the case of *Murgatroyd v. Robinson*,^s it was held that a practice of placing cinders in heaps upon land abutting on a stream, or even in the stream, continued for twenty years, could not be set up as a defence to an action by a mill-owner lower down the stream, whose mill was damaged by the cinders floating down, unless the cinders had been accustomed to float down, and similar damage had been submitted to for the whole period of the twenty years.

The power of resistance which is requisite to render an easement capable of being acquired by prescription, is not a power of resisting only by an immense outlay of money, or by the employment of almost superhuman efforts, but a power of resisting by some reasonable means.¹ Thus, in *Arkwright v. Gell*,^t Parke, B., said, while delivering the judgment of the court: "How can it be supposed that the mine-owners could have meant to burden themselves with such a servitude so destructive to their interests; and what is there to raise an inference of such an intention? The mine-owner could not bring any action against the person using the stream of water, so that the omission to bring an action could afford no argument in favor of the presumption of a grant; nor could he prevent the enjoyment of that stream of water by any act of his, except by at once making a sough at a lower level, and thus taking away the water en-

The power to resist must be by reasonable means.

^r 1 B. & S. 940; 31 L. J. Q. B. 65.

^s 7 E. & B. 391; 26 L. J. Q. B. 233; *Cooper v. Barber*, 3 Taunt. 99.

¹ See *Angus v. Dalton*, L. R. 3 Q. B. D. 85.

^t 5 M. & W. 203; 8 L. J. N. S. Exch. 201.

tirely ; a course so expensive and inconvenient that it would be very unreasonable, and a very improper extension of the principle applied to the case of lights, to infer from the abstinence from such an act an intention to grant the use of the water in perpetuity as a matter of right." So, also, in the case of *Webb v. Bird*,¹³ which was an action for obstructing the wind accustomed to flow to a windmill, the Court of Exchequer Chamber said : " We think, in accordance with the judgment of the Court of Common Pleas, and the judgment in *Chasemore v. Richards*, that the presumption of a grant from long continued enjoyment only arises where the person against whom the right is claimed might have interrupted or prevented the exercise of the subject of the supposed grant. As was observed by Lord Wensleydale, it was going very far to say a man must go to the expense of putting up a screen to window-lights to prevent a right being gained by twenty years' enjoyment. But in that case the right claimed, which was the percolating of water under ground, went far beyond the case of a window. In the present case it would be practically so difficult, even if not absolutely impossible, to interfere with or prevent the exercise of the right claimed, subject as it must be to so much variation and uncertainty, as pointed out in the judgment of the court below. And we think it clear that no presumption of a grant, or easement in the nature of a grant, can be raised from the non-interruption of the exercise of what is called a right by the person against whom it is claimed, as a non-interruption by one who might prevent or interrupt it."

A presumption of a grant cannot arise, and consequently an easement cannot be acquired by prescription, if the servient owner at the commencement of the prescriptive user was incapable of making a grant. Incapacity to make a grant may be either legal or physical, but in either case proof of such incapacity will rebut a presumption which might otherwise arise that such a grant was

¹³ 13 C. B. N. S. 841 ; 31 L. J. C. P. 335. In the court below, 10 C. B. N. S. 268 ; 30 L. J. C. P. 384.

made. Lord Ellenborough, C. J., has said that the foundation of presuming a grant against any party is, that the exercise of the adverse right on which such presumption is founded was against the party capable of making a grant.^v For this reason it was held that no easement could be acquired in certain glebe land, for that the rector was a mere tenant for life, and had no power to make a grant capable of binding the land in the hands of his successors;^w and for the same cause an easement cannot be acquired by prescription against a corporation established for a particular purpose unconnected with that easement; for any grant of such a right would be *ultra vires* and void.^x

For this reason a railroad company, having itself only an easement in its road-bed, cannot grant an easement of a foot-way for persons to walk along its track; and no such prescriptive right can be acquired against the company by persons so using the road, even if all the other requisites of a prescription exist.¹ For similar reasons a prescriptive right can not be gained against an infant, married woman (at common law), or insane person, if so *when the use commenced*, unless continued for a sufficient period after such disability is removed.²

Neither can an easement be acquired by prescription if the dominant owner is incapable of *taking* the right by grant. This rule is founded on the same principle as the last—that if from any cause a grant could not in reality have been made, no presumption of such a grant can arise. On this ground it has been held that variable bodies of persons, such as inhabitants of a village, or parishioners in a parish, are incapable of prescribing for any

Incapacity of dominant owner to take by grant.

^v *Daniel v. North*, 11 East, at p. 373; *Mill v. Commissioners of the New Forest*, 18 C. B. 60; 25 L. J. C. P. 212.

^w *Barker v. Richardson*, 4 B. & Ald. 579; *Winship v. Hudspeth*, 10 Exch. 5; 23 L. J. Exch. 269; *Sutton v. Lord Montfort*, 4 Sim. 559.

^x *National Guaranteed Manure Co. v. Donald*, 4 H. & N. 8; 28 L. J. Exch. 185.

¹ *Sapp v. Northern Central Railroad Co.* to be reported in 49 Md.

² See *Edson v. Munsell*, 10 Allen, 557, an elaborate and valuable judgment by Gray, J.; *Lamb v. Crosland*, 4 Rich. 540.

right; they can only claim by custom.^y Corporations, however, may prescribe in a *que-estate*;^z but if a company is incorporated for a particular purpose, it cannot accept a grant of an easement for a different purpose, and consequently cannot acquire a right by prescription if the title thereto is founded upon a presumption of such a grant.^a

In the last two cases a question may arise as to the time at which incapacity to make or take a grant will have the effect of preventing acquisition of an easement by prescription, for incapacity may exist at one time and not at another. The incapacity will have this effect, it is presumed, only if it exists at the time at which it is necessary to presume the grant to have been executed. Thus, if an easement is claimed by prescription at common law, which requires immemorial user, the presumption of the grant will be rebutted if the incapacity can be proved at any period, however remote, unless the commencement of the incapacity be shown, for if that be shown it may still be presumed that a grant was made before the time of legal memory, which would be before the incapacity. If, on the other hand, the easement is claimed under the Prescription Act, it will be sufficient to rebut the presumption of a grant, to prove incapacity at the commencement of the twenty years, unless the party claiming the right could prove user before the incapacity began, and that it continued during the incapacity up to the time of suit. Thus, a landowner cannot grant an easement if he has leased his land to a tenant, and if the easement is first used during the tenancy, no presumption of grant can arise against him; but if the user began before the lease was made, and was continued during the lease, and up to the time of suit, there is no reason why a grant may not be presumed to have been made before the

^y *Gateward's case*, 6 Coke, 60; *Foxall v. Venables*, Cro. Eliz. 180; *Mounsey v. Ismay*, 3 H. & C. 486; 34 L. J. Exch. 52; *Constable v. Nicholson*, 14 C. B. N. S. 230; 32 L. J. C. P. 240. Nor can "the public" acquire any right by prescription. *Curtis v. Keesler*, 14 Barb. 511.

^z *Slackman v. West*, Cro. Jac. 673.

^a *National Guaranteed Manure Co. v. Donald*, 4 H. & N. 8.

The time at which incapacity must exist in order to defeat prescription.

lease was executed. These remarks must be considered in conjunction with the provisions of the 7th and 8th sections of the Prescription Act, which provide for periods of incapacity.

IN AMERICA,

it seems clear that a disability or incapacity which did not exist when the prescriptive user commenced, nor when the required time of its use expired, but was only an intervening incapacity, or disability, existing for a short period between those two termini, cannot destroy the presumption of a grant, or a perfect prescriptive title.¹ Whether such incapacity, *commencing after the adverse use has begun*, will ever suspend the acquisition of the easement until it is removed, seems not fully agreed. Some hold that if there be no disability when the prescription begins to run, a subsequent one will not arrest it.² On the other hand, it has been thought that if a prescriptive right commences against an adult landowner, who dies leaving his estate to infant heirs, before the prescription has become complete, its further perfection will be arrested during the minority of such heirs.³ But if so, probably the period of such use after their majority could be added to, or tacked upon that of their ancestor, and so the required time be made out, notwithstanding the intervening infancy. The burden of proving a disability is on him who asserts it.⁴

No easement can be acquired by prescription if the servient owner is ignorant of the user, for if he is ignorant no grant can be presumed to have been made by him.⁵ In other words, the user must be either proved to have been known to the owner of the servient tenement, or so open and notorious that he must be

No prescription if servient owner is ignorant of user.

¹ See *Wallace v. Fletcher*, 30 N. H. 434.

² See *Tracy v. Atherton*, 36 Vt. 503, an able opinion by Poland, C. J.; *Mebane v. Patrick*, 1 Jones (N. C.), 26; *Reimer v. Stuber*, 20 Penn. St. 463; *Wallace v. Fletcher*, 30 N. H. 434; *Allis v. Moore*, 2 Allen, 306; *Currie v. Gale*, 3 Allen, 330.

³ See *Melvin v. Whiting*, 13 Pick. 184; *Lamb v. Crossland*, 4 Rich. 536.

⁴ *Davidson v. Nicholson*, 59 Ind. 411.

⁵ *Daniel v. North*, 11 East, 370; *Partridge v. Scott*, 3 M. & W. 220; 7 L. J. N. S. Exch. 101.

presumed to have had knowledge of it ;¹ and if so, it is not essential to prove he did, in fact, see the property.²

That a person has notice of a fact is frequently a difficult thing to prove by direct evidence ; sometimes, indeed, it is impossible to prove it, and this is more commonly the case when the person whose knowledge is to be proved has no interest in the existence of the fact, but still more difficult is it to prove knowledge, if it is against his interest that it should be proved. It is against the interest of the servient owner that his knowledge of user of an easement during the period of prescription should be proved, and it is consequently in many cases very difficult to establish a right to an easement claimed by prescription ; sometimes, however, knowledge may be presumed by reason of surrounding circumstances ; thus, in the case of *Gray v. Bond*,^c Dallas, C. J., said : “ I agree with the argument which has been urged on the part of the defendants, that mere lapse of time will not of itself raise against the owner the presumption of a grant. When lapse of time is said to afford such a presumption, the inference is also drawn from accompanying facts ; and here, where there is no direct evidence whether or not the owner of the land had any knowledge of what passed, the inference to be drawn must, in a peculiar degree, depend on the nature of the accompanying facts ; and the presumption in favor of a grant will be more or less probable, as it may be more or less probable that those facts could not have existed without the consent of the owner of the land.”

No prescriptive right can be acquired unless the dominant and servient tenements, and also the subject of the easement, are permanent in their character ; for no grant can be presumed if either the dominant or servient tenement is erected or exists merely for a temporary purpose, or if the subject of the easement is intended to last but for a short time. There are various authorities in support of this proposition —

No prescription unless dominant and servient tenements, and the subject of an easement, are permanent.

¹ See *Morse v. Williams*, 62 Me. 445 ; *Carbrey v. Willis*, 7 Allen, 364 ; *Cleveland v. Ware*, 98 Mass. 409 ; *Esling v. Williams*, 10 Barr, 126.

² See *Ward v. Warren*, 15 Hun, 600 ; *Worrall v. Rhoads*, 2 Whart. 427.

^c 2 B. & B. at p. 671.

as, for instance, the case of *Maberley v. Dowson*,^d which was an action for obstructing light from the window of a workshop. The shop was not fixed to the freehold, but was built upon posts fixed into stone plinths, which in their turn rested upon some slight brickwork: the judgment was that no right to light had been acquired even by thirty years' enjoyment, for that the building was not attached to the freehold, but was a mere contrivance for temporary purposes, which would not pass with the inheritance, and that owing to its temporary character it was impossible to infer the consent of the owners, or occupiers of the adjoining land. There are several cases relating to watercourses to the same effect, particularly *Arkwright v. Gell*,^e which is the leading case on the subject of acquisition of easements in artificial watercourses, and which will therefore receive further consideration in the next section of this chapter. For the present purpose it may be stated that it was decided in that case that no right can be acquired by prescription to the flow of water against the originator of an artificial stream created manifestly for a temporary purpose—as, for instance, the drainage of mines, which may, and probably will, be discontinued when the working of the mines ceases, for that a user for twenty years, or a longer time, would afford no presumption of a grant of right to the water in perpetuity.

Unless the user is of such a character that a valid title may be acquired against all persons, it is not capable of founding a prescriptive title against any. At common law the user must have been such as to raise a presumption of a grant against the owner in fee, and that, of course, would have been binding on tenants, and all persons holding under him; but it may be thought that some change was effected in this respect by the Prescription

Prescriptive user must give title against all persons.

^d 5 L. J. K. B. 261. This case was decided before the passing of the Prescription Act.

^e 5 M. & W. 203; 8 L. J. N. S. 201; *Wood v. Waud*, 3 Exch. 748; 18 L. J. Exch. 305; *Mason v. Shrewsbury and Hereford Railway Co.* L. R. 6 Q. B. 578; 40 L. J. Q. B. 293; *Greatrex v. Hayward*, 8 Exch. 291; 22 L. J. Exch. 137.

Act, which enables easements to be claimed and acquired in right of the occupier of the dominant tenant by user for a limited number of years only : this, however, is not the case, for though user need now be proved for a limited period only, yet the presumption of a grant is thereby raised, not against the occupier of the servient tenement, but against the owner in fee. A portion of the judgment of Parke, B., in the case of *Bright v. Walker*,^f relates to this point ; the question was whether user of a way for twenty years over land belonging to the Bishop of Worcester, in the possession of a lessee for lives, was sufficient to confer a right to the way. Parke, B., said : “ The important question is whether this enjoyment, as it cannot give a title against all persons having estates in the *locus in quo*, gives a title as against the lessee and the defendants claiming under him, or not at all ? We have had considerable difficulty in coming to a conclusion on this point, but upon the fullest consideration, we think that no title at all is gained by an user which does not give a valid title against all, and permanently affect the fee. Before the statute, this possession would indeed have been evidence to support a plea or claim by a non-existing grant from the termor in the *locus in quo* to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence, and in practice the usual course was to state a grant by an owner in fee to an owner in fee. But since the statute, such a qualified right, we think, is not given by an enjoyment for twenty years. For in the first place the statute is ‘ for the shortening the time of *prescription* ; ’ and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the fee in the land. And in the next place the statute nowhere contains any intimation that there may

^f 1 C., M. & R. at p. 219; *Winship v. Hudspeth*, 10 Exch. 5 ; 23 L. J. Exch. 268. It has, however, already been shown that it is not clear that an easement may not be acquired by prescription against a long leaseholder apart from his lessor. See *ante*, p. 12.

be different classes of rights, qualified and absolute — valid as to some persons, and invalid as to others. From hence we are led to conclude that an enjoyment of twenty years, if it give not a good title against all, gives no good title at all; and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now, and is therefore not good as against every one, it is not good as against any one, and therefore not against the defendant.”

No easement can be acquired by prescription, either at common law or under the Prescription Act, unless the user or enjoyment has been “as of right.”¹ “In order to establish a right of way and to bring the case within this section” (*i. e.* the second section of the Prescription Act), “it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so ‘as of right,’ for that is the form in which, by section five, such a claim must be pleaded; and the like evidence would have been required before the statute to prove a claim by prescription or non-existing grant.”² This being so, it becomes very essential to understand the meaning of the phrase “as of right,” and all that is included under that expression. It must, however, in the first place be stated that this rule of law, on account of the peculiar form of the third section of the Prescription Act, does not apply to claims to right to light.³

It will be observed that the Prescription Act makes use of two expressions somewhat similar, though different in form. In the second section it says that no way or other easement shall be defeated as therein mentioned, when such way or other matter shall have been actually enjoyed for twenty years by any person *claiming right thereto*; and in the fifth section, which relates to pleading, it says that it shall be sufficient to allege the enjoyment of the easement claimed *as of right*. It is

User must
have been
“as of
right.”

Prescription
Act:
User “as
of right.”
“Claiming
right
thereto.”

¹ See *ante*, p. 134; *Stevens v. Dennett*, 51 N. H. 324.

² *Bright v. Walker*, 1 C., M. & R., per Parke, B., at p. 219; *Campbell v. Wilson*, 3 East, 294.

³ See *post*, section 2.

evident that the act intends the same meaning to be attached to each of these phrases.ⁱ

These expressions — enjoyment “as of right,” and “claiming right thereto” — in the act, have given rise to some difficulty as to their meaning; it is desirable, therefore, to examine the case in which the meaning has been discussed and explained at some length. The first case is *Bright v. Walker*.^j *v. Walker*,^j already noticed, which was argued two years after the act was passed. On this subject it was said by Parke, B., when delivering the judgment of the Court of Exchequer: “In order to establish a right of way and to bring the case within this section, it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so ‘as of right,’ for that is the form in which, by section five, such a claim must be pleaded: and the like evidence would have been required before the statute to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly, and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done, — if he shall have occasionally asked the permission of the occupier of the land, — no title would be acquired because it was not enjoyed ‘as of right.’ For the same reason it would not, if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed ‘as of right’ the easement, but the soil itself.”

The case of *Tickle v. Brown*^k was decided shortly after *Tickle v. Bright v. Walker* and *The Monmouthshire Canal Company v. Harford*, and the meaning of the act received further and full consideration by the Court of King’s Bench. After reading the second and fifth sections of the act, Lord Denman, C. J., continued: “The greatest difficulty

ⁱ *Tickle v. Brown*, 4 A. & E. 369; 5 L. J. N. S. K. B. 119.

^j 1 C., M. & R. 211; *Monmouthshire Canal Co. v. Harford*, 1 C., M. & R. 614.

^k 4 A. & E. 369; 5 L. J. N. S. K. B. 119; *Beasley v. Clarke*, 2 Bing. N. C. 705; 5 L. J. N. S. C. P. 281; *Gaved v. Martyn*, 19 C. B. N. S. 732; 34 L. J. C. P. 353.

arises from the language of the concluding paragraph of this (*i. e.* the fifth) "section, and more particularly from the words 'or any cause or matter of fact, or of law not inconsistent with the simple fact of enjoyment.' As all these matters are required to be specially pleaded, and forbidden to be given in evidence under a general traverse of the enjoyment as of right, it is plain that they are treated by the legislature as consistent with such enjoyment; and as by the rules of pleading and of logical reasoning, every allegation by way of answer which does not deny the matter to which it is proposed as an answer, is taken to confess it, we must conclude that the legislature used the words 'as of right,' in such a sense as that a party confessing the enjoyment '*as of right*' for forty years, or twenty, as the case may be, may account for and avoid the effect of it by alleging, in the one case, a consent or agreement, provided it be by deed or writing (see section two), and in the other, any contract, &c., written or parol (see section five). It follows that the words *as of right* cannot be confined to an adverse right from all time, as far as evidence shows, for if they were so confined, such enjoyment once confessed could not be avoided by replying that it was held by contract, which is not adverse. Again, as the legal right to a way cannot pass except by deed, it is plain that the words 'enjoyment as of right' cannot be confined to enjoyment under a strict legal right, for then a consent or agreement in 'writing,' *not under seal*, of which the second section speaks, could not account for such enjoyment. The words, therefore, must have a wider sense; and yet they must have the same sense as the words 'claiming right thereto' in the second section, otherwise there will be incongruities in the construction of the act. It seems, therefore, that the 'enjoyment as of right' must mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion, or even on many occasions of using it, but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it without danger of being treated as a trespasser, as a matter of a right, whether strictly legal by prescription

and adverse user, or by deed conferring the right, or though not strictly legal, yet lawful to the extent of excusing a trespass — as by a consent or agreement in writing not under seal, in case of a plea for forty years, or by such writing or parol consent or agreement, contract or license, in case of a plea for twenty years.”

From the above-mentioned decisions the principles are gained, that an easement cannot be acquired by prescription if the user has been enjoyed by permission or by stealth, or if it has been precarious; but permission for user does not in every case prevent the acquisition of an easement by prescription, for the enjoyment “as of right,” it is said, is not to be confined to an adverse right, and enjoyment is as of right if it is had by permission. But whether an easement can be gained after user enjoyed by permission depends upon the time when the permission was granted. On this point it has been laid down that if the permission is given before the commencement, and if it extends over the whole period of prescription, the user is “as of right,” and without interruption, within the meaning of the act; but that it is otherwise, if permission is given from time to time during the continuance of the user.¹

Besides enjoyment by permission or by stealth, enjoyment that is not peaceable, is insufficient to confer a right to an easement by prescription; and this is so for two reasons — such enjoyment cannot be said to have been “as of right,” and it is impossible that any presumption of a grant can arise from that kind of user. It is commonly said that no easement can be acquired by prescription if the user has been enjoyed, *vi, clam, aut precario*. The word *vi* does not simply mean by violence or force, but it means also during strife or contention of any kind — as, for instance, that the enjoyment has been had during a period of litigation about the right claimed, or that the user has been continually disputed and interrupted by physical obstacles placed with a view of rendering user impracticable. If the

User must
not be by
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or by
stealth or
precarious.

User must
be peace-
able.

¹ Kinloch v. Nevile, 6 M. & W. 795; Clay v. Thackrah, 9 C. & P. 47.

user has been in this sense not peaceably enjoyed, no easement can be thereby acquired.^m

Verbal complaints, remonstrances, positive prohibitions, and the like are sufficient to prevent the acquisition of the right.¹

It is provided by the Prescription Act (section four), that no act or other matter is to be deemed to be an interruption within the meaning of the act, unless the same shall have been submitted to or acquiesced in for one year; but notwithstanding this provision, an interruption for a shorter period may be very important as evidence of the enjoyment not having been "as of right."ⁿ

Interruptions, evidence against peaceable enjoyment.

Besides the above, there are various circumstances which will have the effect of rendering user insufficient for the acquisition of an easement by prescription — as, for instance, the circumstance that the right has not been enjoyed in the character of an easement. It has already been remarked that unity of possession during all or part of the time will prevent the acquisition of a prescriptive title, for in that case "the claimant would not have enjoyed 'as of right' the easement, but the soil itself."^o A tenant of land cannot acquire an easement by prescription in other land of his lessor, even though the latter has merely a term of years or an estate for life in it, and there is no unity of seisin or possession, for all the tenant's rights are derived from his lessor, and as the latter could not

Privilege must be enjoyed in the character of an easement.

^m *Eaton v. Swansea Waterworks Co.* 17 Q. B. 267; 20 L. J. Q. B. 482; *Livett v. Wilson*, 3 Bing. 115; 3 L. J. C. P. 186; *Gaved v. Martyn*, 19 C. B. N. S. 732; 34 L. J. C. P. 353.

¹ See *Powell v. Bagg*, 8 Gray, 441; *Stillman v. White Rock Co.* 3 Wood. & Min. 549; *Nichols v. Aylor*, 7 Leigh, 565; *Tracy v. Atherton*, 36 Vt. 514; *Lehigh Valley Railroad v. McFarlan*, 30 N. J. Eq. 135; *Chicago v. Northwestern Railway Co.* 90 Ill. 349.

ⁿ *Eaton v. Swansea Waterworks Co.* 17 Q. B. 267.

^o *Bright v. Walker*, 1 C., M. & R. at p. 219; *Onley v. Gardiner*, 4 M. & W. 496; 8 L. J. N. S. Exch. 102; *Battishill v. Reed*, 18 C. B. 696. And see *Gayetty v. Bethune*, 14 Mass. 49, in which the point was directly decided as early as 1817.

have an enjoyment of an easement as of right against himself within the meaning of the statute, so neither can his tenant against him.^p For the same reason a tenant of land cannot acquire an easement by prescription in other land in his occupation, though held under a different landlord.^q

Lastly, the user must be uninterrupted and continuous, in order that it may suffice for the acquisition of an easement by prescription, for, independently of the Prescription Act, which appears to contemplate continuous user, no presumption of a grant can arise, if the user has not been continuous. It will be seen, however, that it is not requisite, in order to support a claim by prescription, either at common law or under the act, that the user shall be incessant;¹ indeed, many easements are by their nature intermittent — that is, usable or used only at times — but the words of the act would not be satisfied by an enjoyment for different and *unconnected* periods only, which, added together, would make up twenty years, for to hold otherwise would let in a great number of cases in which the presumption of a grant could never arise,^r and such enjoyment would for that reason be insufficient at common law. But at common law the time of enjoyment by A. may be added to the time of immediately succeeding use by B., his heir, devisee, or grantee, who immediately continues the use, and thus make up the required period.² It might be otherwise as to successive owners, not claiming under each other.³ It is said above that the

^p *Warburton v. Parke*, 2 H. & N. 64; 26 L. J. Exch. 299. In cases of light a tenant may be able to acquire an easement over his landlord's ground, but this is on account of the peculiar expression of the third section of the Prescription Act. *Frewen v. Phillips*, 11 C. B. N. S. 449; 30 L. J. C. P. 356. See *Rutland v. Keep*, 41 Wis. 490.

^q *Harbidge v. Warwick*, 3 Exch. 552; *Clay v. Thackrah*, 9 C. & P. 47.

¹ See *Pollard v. Barnes*, 2 Cush. 198.

^r *Onley v. Gardiner*, 4 M. & W. 496; 8 L. J. N. S. Exch. 102; *Monmouthshire Canal Co. v. Harford*, 1 C., M. & R., per Parke, B., at p. 631; *Roberts v. Clarke*, 18 L. T. 49. But see per Lord Hatherley, L. C., in *Ladyman v. Grave*, L. R. 6 Ch. App. at p. 768.

² *Leonard v. Leonard*, 7 Allen, 277; *Hill v. Crosby*, 2 Pick. 466; *Sargent v. Ballard*, 9 Pick. 251; *Kent v. Waite*, 10 Pick. 138.

³ *Melvin v. Proprietors of Locks and Canals*, 5 Met. 32.

user must be *uninterrupted and continuous*; by a breach of continuity is meant a cessation of user by the voluntary act of the person claiming the right; but it will be seen shortly that by the word "interruption" the Prescription Act intends interruption by the act of a person other than the claimant of the right who opposes the user of the easement.

Interruptions are of three kinds: (a) Interruptions in the enjoyment *as of right*; (b) Interruptions in the enjoyment *as an easement*; (c) Interruptions in the enjoyment *in fact*.

Interruptions of three kinds.

It has been already shown that at common law the user must have been "as of right," in order that an easement may be acquired by prescription, and that no grant can be presumed if the user was not "as of right;" if, therefore, any interruption can be shown to have occurred in the enjoyment "as of right," the presumption of a grant is rebutted — no matter, at common law, at what time the interruption occurred. The Prescription Act expressly requires actual enjoyment by the person *claiming right* to an easement without interruption *for the full period of twenty years*; if therefore an interruption occurs at any time during the twenty years in the enjoyment "as of right," the statute is not satisfied.* This was pointed out by Parke, B., and Lord Lyndhurst, C. B., during the argument of the case of the Monmouthshire Canal Company v. Harford,[†] when the former said: "The issue is whether the occupiers of the closes *of right* and *without interruption* have had the use and enjoyment for twenty years as they insist under this issue, therefore they must show an uninterrupted rightful enjoyment for twenty years. If they had enjoyed it for one week, and not for the next, and so on alternately, their plea would not have been proved. In the case of *Bright v. Walker*, lately decided in this court, it was held that the claimant must show that he has enjoyed the way for the full period of twenty years, and that he has done so *as of right* and *without interruption*, and

* Light need not be enjoyed "as of right." See *post*, section 2.

[†] 1 C., M. & R. at p. 631; *Bright v. Walker*, 1 C., M. & R. 211.

that such claim might be answered by proof of a license written or parol for a limited period, comprising the whole or part of the twenty years." In the present case the permission asked for and given shows that the occupiers of the closes did not enjoy the way 'as of right,' and also that they did not enjoy it uninterruptedly." Lord Lyndhurst said: "The simple issue is, whether there has been a continued enjoyment of the way for twenty years, and any evidence negating the continuance is admissible. Every time the occupiers asked for leave they admitted that the former license had expired, and that the continuance of the enjoyment was broken."

An interruption may also occur in the enjoyment of an easement *as an easement*—that is, the user may continue in point of fact, but it may be changed in character, as, for instance, it may become one of the rights of ownership if a union of ownership should take place. An interruption of this kind will prevent the acquisition of an easement by prescription, both at common law and under the act. At common law such an interruption would negative the presumption of a grant, for if a grant had originally been made, the right granted would be lost or merged when the grantee acquired the soil of the servient tenement; on severance of the dominant and servient tenements the easement could only be re-created by a fresh grant, and this would be inconsistent with the idea that the easement was created by a grant before the time of legal memory. Under the act, unity of ownership operates as an interruption which will prevent a prescriptive title being gained, for during the union the claimant does not enjoy as of right the easement, but the soil itself."

"It would seem that proof of a license comprising the whole of the period of twenty years would *not* defeat prescription under the act, for it has been shown (*ante*, p. 171) that enjoyment "as of right" in the act is not to be limited to an adverse right, and that if a license is given before the commencement, and if it extends over the whole period of prescription, the user is "as of right," and without interruption, within the meaning of the act.

"Bright *v.* Walker, 1 C., M. & R. at p. 219; Onley *v.* Gardiner, 4 M. & W. 496; 8 L. J. N. S. Exch. 102; Harbidge *v.* Warwick, 3 Exch. 552; 18 L. J. Exch. 245; Battishill *v.* Reed, 18 C. B. 696.

Interruptions in the enjoyment *in fact* are of two kinds, namely: interruptions which prevent acquisition of easements at common law, and interruptions within (c) *In fact.* the meaning of the Prescription Act.

At common law any interruption *in fact*, from which it may be inferred that the enjoyment was not rightful, or that the claimant of the easement intended to abandon his claim, or which is of such a nature that a jury would in consequence refuse to presume that a grant had been made, is sufficient to prevent prescription. Under the first head may be classed such acts of interruption as the locking of gates, or erection of barriers across a way, or the stopping of water flowing in an artificial watercourse; for from acts of this kind it may be inferred that no right to use the way or the water is acknowledged by the servient owner to exist in point of fact, and that if the way were used a trespass would be committed.

Interruptions in fact as at common law.

Mere non-user will not, in every case, prevent acquisition of an easement any more than it will afford conclusive evidence of abandonment after an easement has Non-user. been acquired, but non-user, to have that effect, must be coupled with some act indicative of an intention to abandon the claim, or it must be of such long continuance, and so constant, as to indicate an intention not to resume the user.^w Non-user, however, which would not prevent acquisition of an easement at common law, may often be sufficient to do so under the Prescription Act, which requires *actual* enjoyment.

The case of *Davies v. Williams*^x related to a right of common, but the principle of law laid down in that case applies equally to an easement if it is in its nature divisible; it is there decided that if the user of the easement is interrupted in one part, the interruption only affects the acquisition of the easement as to that part.

Partial interruption of user.

^w *Moore v. Rawson*, 3 B. & C. 332; 3 L. J. K. B. 32; *Stokoe v. Singers*, 8 E. & B. 31; 26 L. J. Q. B. 257; *Regina v. Chorley*, 12 Q. B. 515. See *Pollard v. Barnes*, 2 Cush. 197; *Haag v. Delorme*, 30 Wis. 591; *post*, chapter V.

^x 16 Q. B. 546; 20 L. J. Q. B. 330.

It should be mentioned that a trifling alteration in the course of a stream, or an accidental stoppage in the flow of water, is not an interruption which will prevent prescription, for if such interruptions had that effect, said Tindal, C. J., the accident of a dry season, or other causes over which the party could have no control, might deprive him of a right established by the longest course of enjoyment.^v

So also suspension of user by agreement, or the temporary substitution, by agreement or for convenience, of another way for that to which the right is claimed, is not an interruption in the enjoyment which will defeat a claim by prescription, for under those circumstances there is constructive enjoyment of the easement, and such non-user will not rebut the presumption of a grant.^z

Interruptions, when claims to easements are made under the Prescription Act, somewhat differ from interruptions when claims are made by prescription at common law, since it was thought right by the legislature when passing that act to define what was meant by the word "interruption" as it is used in the statute. By the fourth section of the act it is enacted, that "no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made." However conclusive an interruption, therefore, may be against the presumption of a grant, in which way it may prevent acquisition of an easement at common law, it will have no effect under the statute, unless it has been submitted to for one year. The unreasonableness of this provision was remarked by Parke, B., in the Exchequer Chamber, in the case of *Flight v. Thomas*,^a and it was also noticed in the same

^v *Hall v. Swift*, 4 Bing. N. C. 381.

^z *Payne v. Shedden*, 1 Moo. & Rob. 382; *Reignolds v. Edwards*, Willes, 282; *Carr v. Foster*, 3 Q. B., per Patteson, J., at p. 585.

^a 11 A. & E. at p. 693.

case, as a result of this section, that although there may have been a number of interruptions during prescriptive user, they will have no effect in preventing prescription under the act unless one of them happened to continue and to be submitted to for a year. The learned judge expressed his opinion that the more reasonable provision would have been that any interruption acquiesced in should suffice to prevent prescription, as that would conclusively rebut the supposition of a grant. But it was impossible to get over the words of the section.

It has been determined that an interruption within the meaning of the act is an actual discontinuance of enjoyment of user, and that not by the mere voluntary act of the claimant of the right, but in consequence of an obstructive act done by another person. In *Carr v. Foster*,^b it was held that non-user for two years in the middle of the prescriptive period did not defeat the claim, for that the words of the act are "without interruption," not "without intermission," and that by the fourth section the interruption must be *submitted to or acquiesced in after notice thereof and of the person making or authorizing it* to be made, all which clearly indicates the meaning of the statute. So, also, it was determined in the case of *The Plasterers' Company v. The Parish Clerks' Company*,^c that a money payment for permission to enjoy light was not an interruption under the act, for that an interruption within the meaning of the third section must be such an interruption as is contemplated by the fourth, and that the two together showed that there must be an actual discontinuance of the enjoyment by reason of an obstruction submitted to or acquiesced in for a year. It matters not, however, by whom the obstructive act is committed, for the effect will be the same whether it is done by the owner of the servient tenement, or by a stranger.^d

Voluntary
cessation
of user,
and user
by permis-
sion.

Whether an interruption is submitted to or acquiesced in

^b 3 Q. B. 581; 11 L. J. Q. B. 284.

^c 6 Exch. 630; 20 L. J. Q. B. 362.

^d *Davies v. Williams*, 16 Q. B. 546; 20 L. J. Q. B. 330.

within the meaning of the statute is a question for the jury, for this must depend upon the circumstances of each case and the conduct of the parties; it is not necessary that an action for obstruction should be commenced to rebut the idea of acquiescence or submission, for any conduct indicative of resistance is sufficient.^e

Before leaving the subject of interruptions, a point which arose in the case of *Clayton v. Corby*^f should be noticed. By the seventh section of the Prescription Act periods of life estates are to be excluded in the computation of prescriptive periods, and the question was, if user was continued during a life estate, and the tenant for life interrupted the user, whether the interruption would be effectual, if submitted to, to prevent the acquisition of the easement, or whether the interruption should be disregarded, the period of the life estate being excluded in the computation of the time. It was held that the interruption would prevent the acquisition of the easement, for that though a tenant for life cannot by acquiescence burden the estate, he may by resistance free it from the easement which would otherwise be imposed.

BY DEDICATION OR PUBLIC PRESCRIPTION.

The public, or some local portion of the public, may acquire certain rights in or over the land of private individuals. The learned author has apparently not considered such rights as "Easements," and consequently has devoted no part of his treatise to them; but as they are generally considered in this country as at least "in the nature of easements," some allusion to them may perhaps be expected in this edition. Such rights, when acquired by merely some local portion of the public, as the inhabitants of a town, village, &c., may perhaps

^e *Bennison v. Cartwright*, 5 B. & S. 1; 33 L. J. Q. B. 137; *Glover v. Coleman*, L. R. 10 C. P. 108; 44 L. J. C. P. 66. Acquiescence by some members only of a body of persons who claim a right by prescription under the act is not such an acquiescence as will defeat the claim. *Warrick v. Queen's College, Oxford*, L. R. 10 Eq. 105; 39 L. J. Ch. 636.

^f 2 Q. B. 813; 11 L. J. Q. B. 239.

be said to be gained by "prescription," since the presumption of a grant—the foundation of prescription—may apply to such bodies, as well as to individuals.¹ But when these rights are claimed by the *general public*, it seems more proper to consider them as acquired by presumed dedication of the land to public use, rather than by prescription strictly so called, (although the term "prescriptive" use is frequently applied to it), since the general public, not being able to take by actual grant, may not be capable of acquiring by a presumed grant; but this difficulty (if it be one) is obviated by calling it a right acquired "by dedication," since no grantee is necessary in such cases. And the doctrine of dedication, though comparatively modern, is now well established.² Such dedication is considered an abandonment of the land by the owner to the public use, and although he may in his dedication limit the nature of the use to which the property may be subject,³ as for a way, a footway,⁴ landing-place, public square, &c., yet after it is once dedicated, and there is an acceptance by the public, his power to interfere with such use by the public is gone, and he cannot afterwards devote it to entirely private purposes, or convey it to others in fee;⁵ although undoubtedly he might continue to use his land for any purpose not inconsistent with the public use, since he does not ordinarily, by dedication merely, lose the fee of the soil.⁶ And the dedica-

¹ See 17 Vin. Abr. 256; *Commonwealth v. Low*, 3 Pick. 408; *Nudd v. Hobbs*, 17 N. H. 525.

² See *Rugby Charity v. Merryweather*, 11 East, 375; *Hobbs v. Lowell*, 19 Pick. 405; *Cincinnati v. White*, 6 Pet. 431; *Pomeroy v. Mills*, 3 Vt. 279; *Gardiner v. Tisdale*, 2 Wis. 153; *Connehan v. Ford*, 9 Wis. 240; *Scott v. The State*, 1 Sneed, 632; *Valentine v. Boston*, 22 Pick. 75; *Estes v. Troy*, 5 Me. 368; *Taylor v. Boston Water Power Co.* 12 Gray, 415.

³ *Poole v. Huskinson*, 11 M. & W. 827; *Hemphill v. Boston*, 8 Cush. 197; *Stafford v. Coyney*, 7 B. & C. 257; *Arnold v. Blaker*, L. R. 6 Q. B. 483.

⁴ *Tyler v. Sturdy*, 108 Mass. 196.

⁵ See *Trustees v. Hoboken*, 33 N. J. Law, 13; *Wilson v. Saxon*, 27 Iowa, 15; *Den v. Jersey City*, Spencer, 107; *De Witt v. Ithaca*, to be reported in 76 N. Y.

⁶ *St. Mary, Newington, v. Jacobs*, L. R. 7 Q. B. 53; *Regina v. Pratt*,

tion need not be formal, or in writing; any acts indicating an intention on his part to dedicate the land to public use, — the existence of which is always a question for the jury¹ — are sufficient.² The intention to dedicate, however, ought to be *clearly manifest*, in order to deprive a landowner of his own property.³ The dedication, then, being the real act of the owner of the land, no length of time or of user is necessary, as in prescription, to perfect the rights of the public in the easement.⁴ But to make a dedication complete and final, some acceptance, express or implied, is necessary on the part of the public. The public are not bound to accept a dedication which is offered,⁵ and do not therefore assume any liabilities or duties in regard to the property, until sufficiently accepted.⁶ And therefore, until so accepted, either formally or by actual use and acquiescence, the dedication may be revoked by the donor,⁷ afterwards not. This acceptance may

4 El. & Bl. 868; *Dubuque v. Benson*, 23 Iowa, 248; *Des Moines v. Hall*, 24 Iowa, 234; *Lade v. Shepherd*, 2 Str. 1004; *Covington v. Freking*, 8 Bush, 128.

¹ Or perhaps a mixed question of law and fact. *Cowles v. Gray*, 14 Iowa, 8.

² *Bermondsey v. Brown*, L. R. 1 Eq. 215; *Morse v. Ranno*, 32 Vt. 606; *Waugh v. Leech*, 28 Ill. 492; *Green v. Canaan*, 29 Conn. 172; *Hall v. McLeod*, 2 Metc. (Ky.) 104; *Wright v. Tukey*, 3 Cush. 290.

³ See *Carpenter v. Gwynn*, 35 Barb. 395; *Proctor v. Lewiston*, 25 Ill. 153; *Stacey v. Miller*, 14 Mo. 478; *Gowen v. Phil. Ex. Co.* 5 W. & Serg. 141; *Tallmadge v. East River Bank*, 26 N. Y. 105; *Morse v. Ranno*, 32 Vt. 600. And must be made by the owner of the freehold. *Gentleman v. Soule*, 32 Ill. 272.

⁴ *Jarvis v. Dean*, 3 Bing. 447; *Woodyer v. Hadden*, 5 Taunt. 125; *Bissell v. N. Y. Central R. R. Co.* 26 Barb. 635; *State v. Atherton*, 16 N. H. 211; *Child v. Chappell*, 5 Seld. 246; *Rees v. Chicago*, 38 Ill. 322; *Fisher v. Beard*, 32 Iowa, 346.

⁵ *Fisher v. Browse*, 2 B. & S. 770; *Robbins v. Jones*, 15 C. B. N. S. 221; *Greene v. Chelsea*, 24 Pick. 71; *Gentleman v. Soule*, 32 Ill. 271.

⁶ *Hobbs v. Lowell*, 19 Pick. 405; *Bowers v. Suffolk Man. Co.* 4 Cush. 332; *State v. Trask*, 6 Vt. 355; *Dubuque v. Maloney*, 9 Iowa, 455.

⁷ *San Francisco v. Calderwood*, 31 Cal. 585; *Lee v. Lake*, 14 Mich. 12; *Baker v. Johnston*, 21 Mich. 319; *Wilder v. St. Paul*, 12 Minn. 200; *Munson v. Hungerford*, 6 Barb. 272; *Baker v. St. Paul*, 8 Minn. 494; *Becker v. St. Charles*, 37 Mo. 13. A permissive use of a way by certain particular

be oftentimes proved by mere enjoyment by the public, and then no length of time for the enjoyment is absolutely necessary, yet of course the duration and extent of the enjoyment strengthen the proof of acceptance. And if beneficial to the public, and no dissent or reason for dissent appears, the acceptance is easily presumed.¹ Although it is often said that the public acquire rights of way, &c., "by prescriptive use," perhaps no more is meant, when accurately stated, than that the public by long use prove their acceptance of what had before been dedicated by the landowner, and so the right of the public becomes complete and perfect by such long use. It might require stronger proof of acceptance in order to render a town liable to travellers for injuries received upon a way, than to authorize the public to travel over it, without objection by the owner.² Indeed, in some states, statutes exist declaring that towns or cities shall not be liable for injuries received on ways merely dedicated by the landowners to public use, but which have never been officially adopted or laid out by the public authorities; but a further consideration of that particular subject is not germane to the scope of this work.

ACQUISITION OF EASEMENTS UNDER A CUSTOM.

The last means by which easements may be acquired is CUSTOM. Some remarks have already been made on this subject,³ on which occasion it was explained that though a

portions of the community constitutes only a license and not a dedication, and is revocable. *Stafford v. Coyney*, 7 B. & C. 257; *Bermondsey v. Brown*, L. R. 1 Eq. 215.

¹ See *Guthrie v. New Haven*, 31 Conn. 321; *Holdane v. Trustees*, 23 Barb. 123; *Curtiss v. Hoyt*, 19 Conn. 154; *Noyes v. Ward*, 19 Conn. 265; *Child v. Chappell*, 5 Seld. 256.

² See *Hyde v. Jamaica*, 27 Vt. 443; *Blodgett v. Royalton*, 14 Vt. 294; *Paige v. Weathersfield*, 13 Vt. 429; *Joliet v. Verley*, 35 Ill. 58.

³ See *ante*, chapter I. p. 18. An owner of a close can alone prescribe for a right of way in right of himself and his predecessors, owners of the inheritance. A claim by custom in the parish that all the occupiers of such a close have had the way is bad. *Baker v. Brereman*, Cro. Car. 418.

custom and an easement are altogether different, yet that there can be a custom in a locality under and by virtue of which an easement may be acquired by an owner of land situated in the locality to which the custom belongs. Some instances of easements claimed under customs were also mentioned.

It may be remarked that an easement cannot be established both by prescription and under a custom by the same evidence, for prescription and custom are different in their characters. A prescriptive and a customary right to the same privilege may possibly coexist if each be distinctly proved by proper evidence, but this is doubtful. In *Blewett v. Tregonning*,^a it was said that it would be inconsistent with common sense to say that the very same facts could prove two rights of a completely different nature, such as that of one taking sand by prescription to himself and his ancestors alone in respect of particular lands, and to himself in common with his brother farmers in respect of all lands in the parish in respect of which the prescription is claimed, and also to himself and all the inhabitants of the county. If an easement is claimed both by prescription and under a custom, and the same evidence is offered to establish each, the jury must consider which, if either, is proved, for they cannot find in favor of both. But, of course, different persons may have a right of way, for instance, over the same land, by different titles, one by grant, another by prescription, and a third by custom. If such right is common to all the inhabitants of a manor, district, hundred, parish, town, or county, it is holden as a *custom*. If it is limited to an individual and his assigns, to a private corporation or its successor, or is attached to some particular estate, and exercised only by those who own such estate, it is holden as a prescriptive right, and is then either personal in its character, or is prescribed in a *que-estate*.¹

Claims to easements by custom are expressly recognized in

^a 3 A. & E. at p. 588.

¹ See *Perley v. Langley*, 7 N. H. 235; *Kent v. Waite*, 10 Pick. 138.

the second section of the Prescription Act, in which it is said that no claim which may be lawfully made at the common law *by custom* to any way, &c., when such way, &c., shall have been actually enjoyed for twenty years, shall be defeated by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years. It is difficult to see what is the precise effect of this section on claims to easements under a custom, for if a claim is made under a custom alleged to have existed from time immemorial, the claim is made at common law, and the Prescription Act does not preclude easements from being so claimed;ⁱ but if the claim be made under the act, a claim under a custom is in every way similar to a claim by prescription. Possibly, however, evidence which would be insufficient to support an easement claimed by prescription under the act would be sufficient if it was alleged that the right depended upon a custom, and that there had been actual user for twenty years.

Claims by custom under the Prescription Act.

That easements claimed by custom may be sustainable in point of law, they must be possessed of the same characteristics as those which are essential for the validity of customs generally. Thus they must be reasonable and certain.^j For this reason it was held in *Jones v. Percival*,¹ that a custom for the inhabitants of a certain place, or the owners of a certain close, to pass over the soil of another wherever it is most convenient to themselves, and least prejudicial to the owner, would be unreasonable and void, and as tending to contention and litigation. So a custom in the inhabitants of a city to erect bay-windows, balconies, and other structures over the public streets, is un-

Must be reasonable and certain.

ⁱ *Holford v. Hankinson*, 5 Q. B. 584.

^j *Broadbent v. Wilkes*, Willes, 360; *Hilton v. Earl Granville*, 5 Q. B. 701; 13 L. J. Q. B. 193; *Wakefield v. Duke of Buccleuch*, L. R. 4 Eq. 613; 36 L. J. Ch. 763; *Blackett v. Bradley*, 1 B. & S. 940; 31 L. J. Q. B. 65; *Carlyon v. Lovering*, 1 H. & N. 784; 26 L. J. Exch. 251; *Rogers v. Taylor*, 1 H. & N. 706; 26 L. J. Exch. 203.

¹ 5 Pick. 485. And see *Holmes v. Seeley*, 19 Wend. 507; *Brice v. Randall*, 7 Gill & J. 349.

reasonable and unlawful.¹ So of a custom to take fish on the land of another from an unnavigable stream running through the same.² So of a custom for the public to use the land of another on a navigable river as a landing-place, and place of deposit for the goods.³

SECT. 2. — *On Acquisition of Particular Easements.*

The first section of this, like that of the preceding chapter, having been devoted to the consideration of those rules of law which relate to easements of all kinds, it is the purpose of this section, to treat of those principles which have exclusive reference to the acquisition of particular sorts of easements only. It has been stated that natural rights are incident to the ownership of land, and are not created or acquired by any act of man, but that all easements are more or less directly referable to a grant of the owner of the servient tenement, either express or implied. In the following pages, therefore, the acquisition of easements as distinguished from natural rights has alone to be considered, those privileges which are easements and those which are natural rights having already been pointed out in the preceding chapter.

AIR.

It has been explained that there are two kinds of easements in connection with the air to which an owner of land may be entitled, and that they are rights relating to the free and uninterrupted passage of air, and rights relating to purity of air; it has also been pointed out which of these are natural rights, and which are easements.

On account of the similitude of light and air with reference to the rules of law respecting the passage thereof to buildings or land, they were considered together in the previous chapter, and the same course is now

Two kinds
of ease-
ments.

Uninter-
rupted flow
of air.

¹ *Codman v. Evans*, 5 Allen, 310.

² *Waters v. Lilley*, 4 Pick. 145.

³ *Pearsall v. Post*, 20 Wend. 111; 22 Wend. 425, in which the subject is exhaustively considered. *Talbott v. Grace*, 30 Ind. 390.

again adopted,^k but it may be mentioned here that a right to free and uninterrupted passage of air may be acquired by grant, express or implied, or by prescription. With ^{Prescriptive right.} reference, however, to the power of acquiring a right to uninterrupted passage of air by prescription, a difference exists between light and air. It will be shown, when treating of light, that a prescriptive right that it shall not be obstructed, can, at the present day, only be acquired under the Prescription Act — special provision having been made in that statute for the acquisition of rights to light — and that, in consequence of the form of words there used, rights to light cannot be acquired now by prescription at common law. With reference to air, however, the case is reverse, ^{Prescription Act.} for no provision was made in the Prescription Act for acquisition of rights to the uninterrupted flow of air, and the common law mode of gaining such a right still remains, and that is, consequently, the only mode by which a prescriptive right to this easement can be acquired. It has been questioned whether a right to uninterrupted flow of air is not an “easement” within the meaning of the second section of the Prescription Act, but it was held, after full argument, both in the Court of Common Pleas and in the Exchequer Chamber, that it was not.^l There can be no doubt, however, that a right that air accustomed to flow to a window shall not be obstructed, may be acquired by prescription at ^{Common law.} common law, as will be shown hereafter ; but this being so, the somewhat curious case of *Webb v. Bird*, already referred to, arose, in which the action was brought for obstructing the wind, which was accustomed to flow to a windmill, by erecting a building ; the right, it was held, could not be acquired by prescription under the statute, as the act does not apply to that sort of easement, and it was impossible, moreover, to presume a grant from long user, for there was no reasonable means by which enjoyment of the flow of the wind could have been interrupted ; it follows for the same reason,

^k See *post*, “Light,” p. 189.

^l *Webb v. Bird*, 10 C. B. N. S. 268; 30 L. J. C. P. 384; In Exch. Cham. 13 C. B. N. S. 841; 31 L. J. C. P. 335. See *ante*.

that the right could not be acquired by prescription at common law.

In entire harmony with *Webb v. Bird*, it has recently been held in the Court of Appeal, that one owner does not acquire, by a use or enjoyment of more than twenty years, any right to a free and unobstructed flow of air across his chimneys, and that the adjoining owner might lawfully raise his house another story, or pile timber on the top of it, so as to cause the other's chimneys to smoke. And Bramwell, L. J., remarked, "It may be said the reasoning by which this conclusion is reached, if correct, is applicable to lights. So it is to a great extent; and any one who reads the cases relating to the acquisition of a right to light, will see there has been great difficulty in establishing it on principle."¹

Purity of air, as has been explained, is a natural right, but in opposition to this a right may be acquired by a landowner to pollute the air which flows to the land of a neighbor. This easement may be acquired by grant, express or implied, or by prescription.

Express grants of this kind are not of very common occurrence, but as a vendor of a house with windows overlooking his land impliedly grants to the purchaser a right to light, so it would probably be held that a vendor of a factory impliedly grants a right to the purchaser to pollute the air, when necessary and unavoidable, with the smoke and vapors from the factory. The vendor could, of course, only grant such a right as against himself, so as to preclude himself from suing for the nuisance created, he could not impose such a burden on his neighbors.^m

When the air which passes to a person's house or land has been habitually polluted by smoke, or otherwise, for twenty years, a right may be acquired against that person to continue the nuisance. Thus it was said by Lord

¹ *Bryant v. Lefever*, 4 C. P. D. 172; 27 W. R. 612 (1879). And see *Roberts v. Macord*, 1 Moo. & Rob. 230.

^m *Tipping v. St. Helen's Smelting Company*, L. R. 1 Ch. App., per Sir W. Paige Wood, V. C., at p. 67.

Romilly, M. R., in the case of *Crump v. Lambert*,^a "There is, I apprehend, no distinction between any of the cases, whether it be smoke, smell, noise, vapor, or water, or any other gas or fluid. The owner of one tenement cannot cause or permit to pass over or flow into his neighbor's tenement, any one or more of these things in such a way as materially to interfere with the ordinary comfort of the occupier of the neighboring tenement, or so as to injure his property. It is true that, by lapse of time, if the owner of the adjoining tenement, which, in case of light or water, is usually called the servient tenement, has not resisted for a period of twenty years, then the owner of the dominant has acquired the right of discharging the gases or the fluid, or sending smoke or noise from his tenement over the tenement of his neighbor; but until that time has elapsed, the owner of the adjoining or neighboring tenement, whether he has or has not previously occupied it, — in other words, whether he comes to the nuisance, or the nuisance comes to him, — retains his right to have the air that passes over his land pure and unpolluted, and the soil and produce of it uninjured by the passage of gases, by the deposit of deleterious substances, or by the flow of water."

LIGHT.

The consideration of the means of acquiring rights to uninterrupted flow of air, was, on account of the similarity of light and air in this respect, postponed to this place, that the two subjects might be treated together. It has been explained that every man has a natural right to use and enjoy the light and air which naturally come to him, in any way he thinks proper, provided he does not cause unjustifiable damage to other persons by his mode of using them, but that this natural right, differing from the natural right to the flow of water, is subordinate to the right, incident to property, which every person has to build on his own land. Every landowner has perfect right to build on his own ground, though he thereby obstructs his neighbor's

Acquisition of right to uninterrupted light and air.

^a L. R. 3 Eq. at p. 413; *Bliss v. Hall*, 4 Bing. N. C. 183; 7 L. J. N. S. C. P. 122; *Flight v. Thomas*, 10 A. & E. 590; 8 L. J. N. S. Q. B. 337.

light and air, unless his neighbor has acquired a right against him that his light and air shall not be obstructed. This easement of right to uninterrupted light and air may be acquired, like other easements, by express grant, or in England by one implied, or by prescription.

Before explaining the circumstances under which a grant of right to light and air will be implied from the acts of parties, it may be well to point out that no grant of right to uninterrupted light and air can be implied from the circumstance that a landowner suffers another person to open new windows overlooking his land without objection or resistance. The fullest knowledge with entire, but mere acquiescence, cannot bind a party who has no means of resistance, and there is no means of resisting the opening of a new window by the owner of a house; the owner of a house has a perfectly legal right to open any windows he thinks proper, and no action will lie for that act, or for the disturbance of the adjoining landowner's privacy. There may seem to be some hardship that a landowner who has stood by without taking any notice or uttering a remonstrance while his neighbor has incurred expense in building, should be at liberty afterwards to build in front of the windows and destroy the comfort of the house; but he is entitled to do so, and with good reason, for it is far more just and convenient that the party who seeks to add to the enjoyment of his own land by getting anything in the nature of an easement, should be obliged first to secure the right to it by some unambiguous and well understood grant from the landowner, who thereby may know the nature and extent of his grant, and can grant or withhold it as he pleases, or grant it on such terms as he thinks fit to impose, than that such a right should be acquired against him, almost without his cognizance, and in such an uncertain manner.^p

Questions of implied grants of right to light and air gen-

^o *Tapling v. Jones*, 11 H. L. C. 290; 34 L. J. C. P. 344; *Mahan v. Brown*, 13 Wend. 261; *Guest v. Reynolds*, 68 Ill. 478.

^p *Blanchard v. Bridges*, 4 A. & E. 176; 5 L. J. N. S. K. B. 78.

erally arise when persons who own houses and adjoining land sever the property by selling either the houses or the land, or by disposing of both at the same time to different persons.

When a grant is implied.

It is not in every case of severance of houses and land that a grant of a right to light can be implied. To take the above three cases in succession, if a man sells a house which has windows overlooking adjoining land which he retains, he cannot afterwards stop the light from coming to the windows of the house by building on the land; for, when granting the house, he is presumed to have granted also a right to light to the windows, and he may not subsequently derogate from his own grant; so, also, if after selling the house he sells the land to a third person, the latter may not obstruct the light from the windows, for the vendor could only convey the land subject to the same burdens to which it was subject in his own hands.^a In a case, however, where the grantor of a lease of a house for twenty-one years was himself lessee for four years of some neighboring premises which were so low in construction that they did not prevent the light coming to the windows of the house, and he subsequently purchased the low buildings in fee, it was held that the implied grant of right to light was limited to the term the grantor had in the low buildings at the date of the lease of the house, that is, the four years, and that the fact of the subsequent purchase of the freehold estate in fee in the low buildings did not extend the implied grant of right to the longer term.^r If, on the contrary, the owner of a house and land sells the land and keeps the house, there is no such grant by the purchaser of the land implied; for, if the conveyance is absolute, and without any reservation of easements, there is no ground for presuming an intention that a right to light should be reserved by the vendor or

Sale of house reserving adjoining land.

Sale of land reserving house.

^a *Coutts v. Gorham*, Moo. & Mal. 396; *Cox v. Matthews*, 1 Vent. 239; *Palmer v. Fletcher*, 1 Lev. 122; *Sir T. Raym.* 87; *Palmer v. Paul*, 2 L. J. Ch. 154; *Robinson v. Grave*, L. R. Weekly Notes, 1873, p. 83.

^r *Booth v. Alcock*, L. R. 8 Ch. App. 663; 42 L. J. Ch. 557.

granted by the purchaser.⁵ If the house and land are sold simultaneously to different persons, the case is similar to a sale of the house when the land is reserved; for the vendor is presumed to grant a right to light to the purchaser of the house, and the purchaser of the land takes it subject to the restriction that he may not build so as to obstruct the light.⁶

THE AMERICAN LAW.

How generally the American courts deny the acquisition of a right to light and air by *prescription*, as allowed in England, is shown hereafter; but on the point of an implied grant, they are much divided. Four different views seem to prevail. The first is that upon the severance of a tenement, a right to light and air is generally implied *in favor of the grantee* over the remaining land of the grantor, and apparently without reference to the question of its actual necessity for the full enjoyment of the estate granted. The second is that such right is implied only when it is actually necessary, and not where it is only convenient, though highly so, to the purchaser. Third, that such right is *never* implied, however necessary to the enjoyment of the estate purchased. Fourth, that such right is never impliedly *reserved in favor of a grantor*, as against an absolute and unconditional grantee, free from incumbrances, even if under similar circumstances it might be implied in favor of a grantee against his grantor.

1. The right is sometimes implied without much apparent stress upon its necessity to the estate granted.

The earliest reported case on this point is *Story v. Odin*,¹ which, though subsequently shaken if not overruled in its own

⁵ *White v. Bass*, 7 H. & N. 722; 31 L. J. Exch. 283; *Curriers' Co. v. Corbett*, 2 Dr. & Sm. 355; *Ellis v. The Manchester Carriage Co. (Limited)*, 2 C. P. D. 13.

⁶ *Palmer v. Fletcher*, 1 Lev. 122; *Compton v. Richards*, 1 Price, 27; *Swanborough v. Coventry*, 9 Bing. 305; 2 L. J. N. S. C. P. 11. In *Swanborough v. Coventry*, 9 Bing. 305, the land was conveyed "with all the lights, easements, rights, and privileges," &c., and the decision was placed upon the ground of an express, and not a mere implied grant.

¹ 12 Mass. 157.

state, has yet been so often approved and followed elsewhere, that an impartial consideration of the authorities seems to require its consideration as a leading case on this side of the question. In that case Story bought, in 1795, a lot of land of the town of Boston, situated in Dock Square, with a store upon it, having a door and two or three windows looking out over the adjacent vacant lot also owned by the town, and which the town subsequently, in 1812, sold to Odin, who erected a building upon it, covering the whole ground, and adjoining the back wall of the store, and thus obstructed the light and air thereto. The deed to S. was with all the privileges and appurtenances, and without any exception or reservation of a right to build on the adjoining lot, or to stop the lights in the store so sold. It was held to be "clear that the grantors themselves could not afterwards lawfully stop those lights, and thus defeat or impair their own grant; and as they could not do this themselves, so neither could they convey a right to do it to a stranger." And a verdict for S. was sustained.

This case has not only been often cited with apparent approbation in the same state,¹ but also by such distinguished judges elsewhere, as Story, Selden, and others.²

Next after *Story v. Odin*, and much relying upon it, came *Robeson v. Pittenger*,³ in the Court of Chancery of New Jersey in 1838. There S. owning two lots, built a dwelling-house on one "immediately on the line of" the other, with six windows, which opened and received light and air from the other. The house came into the possession of the plaintiff, and the other lot into that of the defendant, who purposed to erect a building thereon which would darken the plaintiff's windows. The plaintiff obtained an injunction against the same, partly upon the ground that the windows had existed for more than twenty years, and partly because "the adjoining lot was owned by the man who built the house and subsequently sold it to the plaintiff."

¹ See *Grant v. Chase*, 17 Mass. 448.

² See *United States v. Appleton*, 1 Sumn. 503; *Lampman v. Milks*, 21 N. Y. 513.

³ 1 Green Ch. 57.

But the most direct, and apparently the best considered recent American authority upon this side of the question is that of *Janes v. Jenkins*.¹ In this case A., the owner of two adjoining lots, called the east and west lots, leased the east lot for ninety-nine years, with a covenant that the lessee might make openings, and place lights in the wall which he contemplated erecting on the west line of said lot. The wall was erected and lights placed in it overlooking the west lot, which A. subsequently conveyed to B. Subsequently to the erection of the wall, and the last deed to B., A. sold the east lot to C., by a deed containing this clause: with, "all and every the rights, alleys, ways, waters, privileges, appurtenances *and advantages* to the same belonging, *or in any wise* appertaining." The deed of the west lot to B. contained a special covenant of warranty, and in an action thereon for an alleged breach by reason of the existence of the wall on the east lot, overlooking the other, whereby the grantee was prevented from building on the same, it was directly held that the owner of the east lot had acquired by his grant a right to maintain the wall and windows, and overlook the other lot; and the case of *Story v. Odin* was cited and approved. Perhaps the peculiar phraseology of the grant in this case may have aided in arriving at the conclusion, but the court seem to fully adopt the broad English doctrine.

The English rule seems also to prevail in Louisiana;² but this may be expressly secured by the civil code there prevailing. See especially articles 707, 711, 712, 713.

2. The second view is that such implied grant exists, where the existing light and air is substantially *necessary* for the enjoyment of the house or building conveyed, but not where it is only *convenient*.

On this subject Judge Washburn, after a review of several authorities, says:³ "So far as weight of authority, both English and American, goes, it would seem that if one sell a house, the light *necessary* for the reasonable enjoyment

¹ 34 Md. 1 (1870).

² *Durel v. Boisblanc*, 1 La. Ann. 407 (1846).

³ Wash. on Easements, chapter IV. sec. 6, p. 618.

whereof is derived from and across adjoining land, then belonging to the same owner, the easement of light and air over such vacant lot would pass as incident to the dwelling-house, *because necessary to the enjoyment thereof*; but that the law would not carry the doctrine to the securing of such easement, as a mere convenience to the granted premises."

It may be that the above is a just and reasonable rule, and ought to prevail; but it is not easy to see that it is positively determined by the authorities referred to by the learned author. It has, however, some supposed analogies to support it, and it has recently been cited and approved in several cases. It was quoted with approbation in *Turner v. Thompson*,¹ although that state denies the doctrine of any *prescriptive* right to light and air.²

In like manner, in *Powell v. Sims*,³ it was held that an implied grant of an easement of lights will be sustained only in cases of real and obvious necessity; and will be rejected when the person claiming the same can, at a reasonable cost, substitute other lights to his building; each case being determined on its own facts as to the *degree* of necessity requisite for a foundation of the rights.

So, also, in *White v. Bradley*,⁴ it seems to have been impliedly admitted that there may be cases falling under Judge Washburn's rule of necessity, though that particular case was decided against the right, on the ground that it was a "mere convenience" to the granted premises.

3. The right is *never* implied. There is certainly some room for argument that if light is absolutely necessary to enjoy the estate granted, a right to its free passage might be implied, in the same manner as a right of way arises where no other means of access exist to the estate conveyed; but the current of modern authorities seems to set against applying this analogy to light and air; especially in those states which repudiate the English doctrine of a prescriptive right of light.

¹ 58 Ga. 268 (1877).

² *Mitchell v. Rome*, 49 Ga. 19.

³ 5 W. Va. 1 (1871).

⁴ 66 Me. 263 (1876).

One of the most striking illustrations of this view may be found in the recent elaborately considered case of *Keats v. Hugo*.¹ The defendant had sold the plaintiff a dwelling-house, by a warranty deed, with all the "privileges and appurtenances." The house stood on the line *adjoining* other vacant land of the defendant, with a door and windows on that side. After the conveyance the defendant erected a structure and woodshed on his vacant lot against the dwelling-house, *and within about eight inches of the same*. The plaintiff brought an action for obstructing his right to light and air, and the question of an implied grant was the only point involved in the case. Two other cases involving similar questions between other parties were also argued by eminent counsel, and the whole were carefully considered together, and the same result reached in each by the whole court. Chief Justice Gray, in an elaborate review of the authorities, establishes, first, that in that state no right of light and air could be obtained by prescription; and second, that the same considerations lead to the position that the doctrine of implied grant (which is there recognized in some other easements), does not apply to this claim. "By nature," he says, "light and air do not flow in definite channels, but are universally diffused. The supposed necessity for their passage in a particular line or direction to any lot of land, is created not by the relative situation of that lot to the surrounding lands, but by the manner in which that lot has been built upon. The actual enjoyment of the air and light by the owner of the house is upon his own land only. He makes no tangible or visible use of the adjoining lands, nor indeed any use of them, which can be made the subject of an action by their owner, or which in any way interferes with the latter's enjoyment of the light and air upon his own lands, or with any use of those lands in their existing condition. In short, the owner of the adjoining lands has submitted to nothing which actually encroached upon his rights, and cannot, therefore, be presumed to have assented to any such encroachment. The use and enjoyment of the adjoining land are certainly

¹ 115 Mass. 204 (1874).

no more subordinate to those of the house where both are owned by one man, than where the owners are different. The reasons upon which it has been held that no grant of a right to air and light can be implied from any length of continuous enjoyment, are equally strong against implying a grant of such a right from the mere conveyance of a house with windows overlooking the house of the grantor. To imply the grant of such a right in either case, without express words, would greatly embarrass the improvement of estates, and, by reason of the very indefinite character of the right asserted, promote litigation. The simplest rule, and that best suited to a country like ours, in which changes are continually taking place in the ownership and the use of lands, is that no right of this character can be acquired without express grant of an interest in or covenant relating to the lands over which the right is claimed."

Story v. Odin was criticised and distinguished, but was not expressly declared to be overruled, as apparently it might safely have been.

The courts of New York also deny the doctrine of an implied grant, especially between lessor and lessee; and they allow a landlord who owns land adjoining the demised premises to build upon it, even though thereby he seriously darkens the light in the buildings leased;¹ Ohio is to the same effect,² even if the use of the windows be actually neces-

¹ *Palmer v. Wetmore*, 2 Sandf. 316 (1849); *Myers v. Gemmel*, 10 Barb. 537 (1851). In *Doyle v. Lord*, 64 N. Y. 432 (1876), the owner of a building having several tenants, with a vacant yard in the rear, which the windows of the building overlooked, and on which were outbuildings for the use of the various tenants, leased one portion of the building to the plaintiff "with the appurtenances;" but the lessor afterwards leased the whole premises to the defendant, subject to the plaintiff's lease, and the defendant attempted to erect buildings on the vacant lots which would obstruct the light and air coming in at the back windows, and also access to the outbuilding. *Held*, that the defendants had no right to darken the windows, and that a right to light and air passed to the plaintiff under the lease, as one of the "appurtenances," but without intending to depart from the American doctrine of light and air. See, also, *Shipman v. Beers*, 2 Abb. N. C. 435 (1877).

Allen v. Stricker, 19 Ohio St. 135 (1869).

sary for the estate granted; and Pennsylvania *inclines* the same way.¹ Indiana, in *Keiper v. Klein*,² in an elaborate opinion, adopted the same rule.

4. Even if the doctrine of an implied grant be applied in favor of a *grantee*, there is much less reason to apply it in favor of the *grantor*, and it may be safely asserted that nowhere, in England or America, can a grantor who has sold a vacant lot without restriction or reservation, having his dwelling-house adjoining, retain any implied right to prevent his grantee from erecting any building or structure on the land granted, even though it should interfere with lights and windows of his own house. The contrary rule would clearly derogate from his grant, since he conveys a fee unrestricted, and *cujus est solum ejus est ad cælum*.

This was the point really involved in the elaborate and well-considered case of *Morrison v. Marquardt*,³ although the court inclined to apply the same rule conversely, certainly unless it be clear from the deed that the parties intended differently.

And this is undoubtedly the English law: the grantee, in the case of an absolute conveyance, has a right to use the land in any lawful way, for if the grantor fear an injury to his lights and air, he should make a restriction in the deed of conveyance.⁴

This point was more fully considered in the late case of *Ellis v. The Manchester Carriage Company*.⁵ There the plaintiff, in 1867, bought nine houses in Manchester, the rear of which abutted on a street or way, on the opposite side of which were certain cottages. In 1868 he bought the cottages also, but by a different title. Both estates had existed in their then condition for over twenty years. In 1870 the plaintiff sold the cottages to D., without any reservation, who after-

¹ *Maynard v. Esher*, 17 Penn. St. 222 (1851); 33 Ib. 371.

² 51 Ind. 316 (1875).

³ 24 Iowa, 35 (1867).

⁴ *Tenant v. Goodwin*, 2 Ld. Raym. 1089, Ld. Holt; *White v. Bass*, 7 H. & N. 722 (1862); *Currier's Co. v. Corbett*, 2 Dr. & Sm. 355 (1865).

⁵ 2 C. P. D. 13 (1876).

wards conveyed to the defendants ; they pulled down the cottages and erected a large building upon the site, and also upon a portion of the intervening street or way, and so obstructed the plaintiff's windows. It was held, that although the plaintiff's houses had acquired an "absolute and indefeasible" right to light, under Stat. 2 & 3 Wm. IV. c. 71, s. 3, the defendants were not guilty of any wrongful obstruction of the plaintiff's lights, since his own deed to D. was without any reservation.¹

Hence it will be seen that, in America, although in cases of some easements, such as a right of way, an implied reservation exists in favor of the grantor over or upon the land granted, when reasonably necessary for the use of the estate retained ; this doctrine is not applied to an easement of light and air even by those American courts which, as in England, most firmly support such right in favor of a grantee against his grantor, under like circumstances.

This question has also been elaborately considered in England, in a recent case, before Vice Chancellor Bacon, and in the Court of Appeal, and it was distinctly held, after a careful review of the cases, that when a persons owns two lots, one vacant and one containing buildings with windows overlooking the other, and sells the former, the conveyance containing no express reservation of rights of light, he does not retain any implied right to continue to have the light enter his windows, or to prevent his grantee from building on the vacant lot ; certainly not, if the same is not actually necessary ; and having retained no such right he cannot convey it to a subsequent grantee of the land and buildings.²

As to *simultaneous conveyances* ; the American doctrine is that if neither grantor nor grantee are estopped from obstructing each other's lights, there is no reason why either of two simultaneous grantees from the same grantor should be ; and this is abundantly settled in the American courts.

¹ And see *Warner v. McBryde*, 36 L. T. 360 (1877).

² *Wheeldon v. Barrows*, 12 Ch. D. 31, affirmed in 28 Weekly Rep. 196 ; approving *White v. Bass*, 7 H. & N. 722, and limiting *Pyer v. Carter*, 1 H. & N. 916.

Thus, in *Collier v. Pierce*,¹ the owner of two adjoining lots, on one of which was a building near the dividing line, with a window overlooking the other vacant lot, sold them both by auction on the same day to different purchasers, "with all the privileges and appurtenances." The purchaser of the vacant lot erected a building thereon which darkened the other's window; but it was held the purchaser of the house acquired no right by implication from his deed to continued light and air over the other lot, even though the sale and deed to him preceded in point of time that to the buyer of the vacant lot. The subject was carefully examined in *Keiper v. Klein*,² where both lots were sold by the same grantor, at auction on the same day; but this was held to make no difference in the rule, the court saying (page 320), "We can see no difference between a public and private sale, if made by the vendor, as affecting the construction of the conveyance after it is made."

In *Mullen v. Stricker*,³ the owner of two adjoining lots by a substantially simultaneous sale sold the same to different parties, without any express words of grant of light and air, and it was held that the purchaser of one lot on which was a house had no action against the other for obstructing the same. The court say (page 143): "In the view we take of this case, it is unnecessary to consider the effect of the circumstance that the lots were simultaneously sold at auction. In a proper case, no doubt, that fact might go far to rebut the implication of a grant, and there are a number of decisions to that effect. In such a case it would, perhaps, be quite immaterial which deed was executed first, as the parties to the first deed would be held to have known and intended at the time of its execution that the other deed was to be executed also, and was to be made conformable to the terms and conditions of the sale, neither purchaser having any preference over the other. But we place our decision of the case upon other grounds, and need not, therefore, discuss the question whether

¹ 7 Gray, 18 (1856). And see *Royce v. Guggenheim*, 106 Mass. 205 (1870).

² 51 Ind. 316 (1875).

³ 19 Ohio St. 135 (1869).

it is varied by the fact that the lots were simultaneously sold. Nor do we think it necessary to discriminate between the case of an implied grant and that of an implied reservation in a grant. Some of the early English decisions stand upon the ground of such a distinction, holding that the same circumstances of necessity or use, which would support an implication of grant, where the *dominant* estate is first sold, will not support an implication of reservation where the *servient* estate is first sold.

“What we hold is, that the law of implied grants and implied reservation, based upon necessity or use alone, should not be applied to easements for light or air over the premises of another in any case. In our view, therefore, the law of the present case is not in the least varied by the fact that the dominant estate was conveyed first, or by the fact that both lots were sold at the same time. It seems to us that this doctrine of easements in light and air, founded upon sheer necessity and convenience, like the kindred doctrine of ‘ancient windows,’ or prescriptive right to light and air by long user, is wholly unsuited to our condition, and is not in accordance with the common understanding of the community. Both doctrines are based upon similar reasons and considerations, and both should stand or fall together. They are unsuited to a country like ours, where real estate is constantly and rapidly appreciating, and being subjected to new and more costly forms of improvements, and where it so frequently changes owners as almost to become a matter of merchandise. In cases of cheap and temporary buildings, the application of the doctrine would be attended with great uncertainty, and be a fruitful source of litigation. It would, moreover, in many cases, be a perpetual incumbrance upon the servient estate, and operate as a veto upon improvements in our towns and cities. It will be safer, we think, and more likely to subserve the ends of justice and public good, to leave the parties, on questions of light and air, to the boundary lines they name, and the terms they express in their deeds and contracts.”

No grant of right to light is implied from the covenant for quiet enjoyment, commonly made on sale of a house. An

owner of land sold part, giving the ordinary covenant for quiet enjoyment. The purchaser of the remainder of the land built and obstructed the light and air from the former portion, but the Court of Chancery declined to restrain the building, on the ground that the covenant did not mean that the enjoyment of the light and air should not be disturbed."

Covenant
for quiet
enjoyment.

RIGHT BY PRESCRIPTION, AT COMMON LAW.

This seems the appropriate place to present the American law as to a *prescriptive* right to light, which is apparently quite different from the English common law on that subject, previous to the Prescription Act.

Notwithstanding a few early American opinions to the contrary, it is now quite well settled in this country that no right to light and air is acquired laterally over the land of an adjoining proprietor, by mere use or prescription for any length of time. The short ground of the decisions being, first, that the making of a window in one's own building, on his own land, though looking out over the land of his neighbor, is no encroachment on his neighbors's rights, and cannot, therefore, be regarded as *adverse* to him; it lacks, therefore, one of the chief elements of a prescriptive right; second, that the English doctrine is not applicable to the state of things in this country, and would, if applied, work mischievous consequences in our cities and villages.

To Judge Gould, of Connecticut, is apparently due the credit of having first doubted, if not denied, that the English rule ought to be adopted in this country, and of suggesting that possibly the early English cases might be accounted for on the ground that in each case the window, claiming the right, overhung or projected over the adjoining estate, so that it constituted in and of itself an encroachment or incumbrance upon the adjoining property, and thus, by twenty years' existence, acquired the right to continue. But this fact, if so,

"Potts v. Smith, L. R. 6 Eq. 311; 38 L. J. Ch. 58. But as to the effect of this covenant on a special grant, see Leech v. Schweder, L. R. 9 Ch. App. 463; 43 L. J. Ch. 487.

might give the right to continue the window or overhanging structure in its accustomed place, but it would not, therefore, necessarily establish the right to look out of it over the neighboring land. The right of the window *to be* might be thus acquired, but not a right for persons to enjoy the prospect out of it if the adjoining owner saw fit to obstruct it.

In 1838 this question, having been indirectly considered in *Mahan v. Brown*,¹ directly arose in the Supreme Court of New York, in *Parker v. Foote*,² an action on the case for obstructing the light to the plaintiff's house, which he had erected *twenty-four years* before upon a lot of land he had bought of the defendant himself, who had after that lapse of time erected a building on his remaining lot, and thus obstructed the light to the plaintiff's window. The plaintiff's claim was not admitted, and as this may be called the leading case in America, on this side of the question, we give the following extract from the opinion of Bronson, J. In answer to the argument derived from other instances of easements acquired by use or prescription, he says :

“ Most of the cases on the subject we have been considering relate to *ways, commons, markets, watercourses*, and the like, where the user or enjoyment, if not rightful, has been an immediate and continuing injury to the person against whom the presumption is made. His property has either been invaded, or his beneficial interest in it has been rendered less valuable. The injury has been of such a character that he might have immediate redress by action. But in the case of *windows* overlooking the land of another, the injury, if any, is merely ideal or imaginary. The light and air which they admit are not the subjects of property beyond the moment of actual occupancy ; and for overlooking one's privacy no action can be maintained. The party has no remedy but to build on the adjoining land opposite the offensive window. *Chandler v. Thompson*, 3 Camp. 80 ; *Cross v. Lewis*, 2 B. & C. 685, per Bayley, J. Upon what principle the courts in *England* have applied the same rule of presumption to two

¹ 13 Wend. 263.

² 19 Wend. 308.

classes of cases so essentially different in character, I have been unable to discover. If one commit a daily trespass on the land of another, under a claim of right to pass over, or feed his cattle upon it, or divert the water from his mill, or throw it back upon his land or machinery, in these and the like cases, long-continued acquiescence affords strong presumptive evidence of right. But in the case of lights, there is no *adverse user*, nor, indeed, any use whatever of another's property, and no foundation is laid for indulging any presumption against the rightful owner.

“Although I am not prepared to adopt the suggestion of Gould, J., in *Ingraham v. Hutchinson*, 2 Conn. 597, that the lights which are protected may be such as *project* over the land of the adjoining proprietor; yet it is not impossible that there are some considerations connected with the subject which do not distinctly appear in the reported cases. See *Knight v. Halsey*, 2 Bos. & P. 206, per Rooke, J.; 1 Phil. Ev. 125.

“The learned judges who have laid down this doctrine have not told us upon what principle or analogy in the law it can be maintained. They tell us that a man may build at the extremity of his own land, and that he may *lawfully* have windows looking out upon the lands of his neighbor. 2 B. & C. 686; 3 Ib. 332. The reason why he may lawfully have such windows must be because he does his neighbor no wrong; and indeed so it is adjudged, as we have already seen; and yet, somehow or other, by the exercise of a lawful right in his own land for twenty years, he acquires a beneficial interest in the land of his neighbor. The original proprietor is still seised of his fee, with the privilege of paying taxes and assessments, but the right to build on the land, without which city and village lots are of little or no value, has been destroyed by a lawful window. How much land can thus be rendered useless to the owner remains to be settled. 2 B. & C. 686; 2 Car. & P. 465; 5 Ib. 438. Now what is the acquiescence which concludes the owner? No one has trespassed upon his land, or done him a legal injury of any kind. He has submitted to nothing but the exercise of a *lawful* right on

the part of his neighbor. How then has he forfeited the beneficial interest in his property? He has neglected to incur the expense of building a wall twenty or fifty feet high, as the case may be — not for his own benefit, but for the sole purpose of annoying his neighbor. That was his only remedy. A wanton act of this kind, although done on one's own land, is calculated to render a man odious. Indeed, an attempt has been made to sustain an action for erecting such a wall. *Mahan v. Brown*, 13 Wend. 261. There is, I think, no principle upon which the modern *English* doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in *England*; and I see that it has recently been sanctioned with some qualification by an act of parliament. Stat. 2 & 3 Wm. IV. c. 71, s. 3. But it cannot be applied in the growing cities and villages of this country without working the most mischievous consequences. It has never, I think, been deemed a part of our law. 3 Kent's Com. 446, note *a*.

“Nor do I find that it has been adopted in any of the states. The case of *Story v. Odin*, 12 Mass. 157, proceeds on an entirely different principle. It cannot be necessary to cite cases to prove that those portions of the common law of England which are hostile to the spirit of our institutions, or which are not adapted to the existing state of things in this country, form no part of our law. And besides, it would be difficult to prove that the rule in question was known to the common law previous to the 19th of April, 1775. Const. N. Y. art. 7, § 13. There were two *nisi prius* decisions at an earlier day, *Lewis v. Price*, in 1761, and *Dongal v. Wilson*, in 1763; but the doctrine was not sanctioned in Westminster Hall until 1786, when the case of *Darwin v. Upton* was decided by the K. B. 2 Saund. 175, note 2. This was clearly a departure from the old law. *Bury v. Pope*, Cro. Eliz. 118.”

This decision has often been approved in New York, and may be considered the settled law of that state.¹

¹ See *Myers v. Gemmel*, 10 Barb. 537 (1851); *Doyle v. Lord*, 64 N. Y. 439 (1875).

In 1847 the Supreme Court of Maine, in *Pierre v. Fernald*,¹ thus forcibly stated the objections to the English rule: "Nothing in the law can be more certain than one's right to occupy and use his own land as he pleases, if he does not thereby injure others. He may build upon it, or occupy it as a garden, grass-plat or passageway, without any loss or diminution of his rights. No other person can acquire any right or interest in it, merely on account of the manner in which it has been occupied. When one builds upon his own land immediately adjoining the land of another person and puts out windows overlooking that neighbor's land, he does no more than exercise a legal right. This is admitted. *Cross v. Lewis*, 2 B. & C. 686. By the exercise of a legal right he can make no encroachment upon the rights of his neighbor, and cannot thereby impose any servitude or acquire any easement by the exercise of such a right for any length of time. He does no injury to his neighbor by the enjoyment of the flow of light and air, and does not, therefore, claim or exercise any right adversely to the rights of his neighbor. Nor is there anything of similitude between the exercise of such a right and the exercise of rights claimed adversely. It is admitted in the case supposed that no adjoining landowner can obtain redress by any legal process. In other words, that his rights have not been encroached upon; and that he has no cause of complaint. And yet, while thus situated for more than twenty years, he loses his right to the free use of his land, because he did not prevent his neighbor from enjoying that which occasioned him no injury and afforded him no just cause of complaint. The result of the doctrine is, that the owner of land not covered by buildings, but used for any other purpose, may be deprived of the right to build upon it by the lawful acts of the owner of the adjoining land performed upon his own land and continued for twenty years.

"It may be safely affirmed that the common law contained no such principle. The doctrine as stated in the more recent decisions appears to have arisen out of the misapplication in England of the principle, by which rights and easements are

acquired by the adverse claim and enjoyment of them for twenty years, to a case in which no adverse or injurious claim was either made or enjoyed."

The courts of Pennsylvania also deny the application of the English doctrine to our situation.¹

In South Carolina, it was long thought that the English rule was sanctioned by the language used in *McCready v. Thomson*; ² but upon full consideration of the arguments and authorities the opposite view was subsequently taken and fully adopted by the Court of Appeals, although the use had continued over fifty years.³

Massachusetts has fully adopted the same doctrine. The question was first suggested by counsel in that state in *Atkins v. Chilson*,⁴ but it became unnecessary to decide it, and again in *Fifty Associates v. Tudor*; ⁵ but subsequently the principle was fully approved and followed in *Rogers v. Sawin*.⁶

In Maryland, also, notwithstanding the dictum to the contrary in *Wright v. Freeman*,⁷ the English rule is now entirely repudiated.⁸ It is true, the Maryland courts still hold that such a right may be acquired by an implied grant arising from a deed of one lot by the proprietor of both; ⁹ but even this is against the current of American decisions.¹⁰ Many

¹ *Hoy v. Sterrett*, 2 Watts, 327 (1833); *Wheatley v. Baugh*, 25 Penn. St. 532 (1855); more emphatically repeated in *Haverstick v. Sipe*, 33 Ib. 368 (1859).

² *Dudley*, 131 (1838).

³ *Napier v. Bulwinkle*, 5 Rich. 311 (1852).

⁴ 7 Met. 402 (1844).

⁵ 6 Gray, 259 (1856).

⁶ 10 Gray, 376 (1858). So in *Carrig v. Dee*, 14 Ib. 583 (1860); and in many other cases since; *Richardson v. Pond*, 15 Gray, 387 (1860); *Paine v. Boston*, 4 Allen, 169 (1862); *Randall v. Sanderson*, 111 Mass. 119 (1872), quite overruling any earlier dicta to the contrary. And it was held quite immaterial that the sill of the overlooking window projected over the boundary line so as to overhang the neighbor's land, or that the window itself would swing outward over the same.

⁷ 5 H. & J. 477.

⁸ *Smith v. White*, and *Cherry v. Stein*, 11 Md. 23 (1858).

⁹ *Janes v. Jenkins*, 34 Md. 1 (1871).

¹⁰ *Keats v. Hugo*, 115 Mass. 216 (1874).

other states — Vermont, Ohio, Texas, Alabama, Indiana, Kentucky, and others — have deliberately adopted the same views.¹

Morrison v. Marquardt,² sometimes cited on the same side, seems to have been decided rather against the doctrine of an implied grant of a right to light and air from a conveyance of the estate to which it is claimed as appurtenant; a very different question, but one, however, which the main current of authorities in America decide the same way as when a right is claimed merely by long use.

In opposition to this long array of express adjudication, what support has the English rule in our courts? The doctrine of a prescriptive right from long use merely does seem to have been approved in New Jersey in *Robeson v. Pittenger*,³ but there was an additional important fact in that case, that the two adjoining lots had been both owned by the same party, and after the plaintiff's building had been erected on one, he had sold the defendant's lot to other parties, from which an implied grant, or reservation rather, has been sometimes deduced of a right to continue the lights as before, and the decision may in part have rested on that ground. If not, it may be considered as fully overruled by the recent case of *Hayden v. Dutcher*.⁴ The same observation applies still more strongly to the case of *Durel v. Boisblanc*.⁵ Judge Story, in *United States v. Appleton*,⁶ apparently approves the doctrine.

Probably the most elaborate case on this side is that of *Clawson v. Primrose*,⁷ in the Court of Chancery of Delaware, in which Bates, Ch., after a critical and exhaustive review of

¹ See *Hubbard v. Town*, 33 Vt. 295; *Hieatt v. Morris*, 10 Ohio St. 530; *Mullen v. Stricker*, 19 Ib. 142; *Klein v. Gehrung*, 25 Tex. 238; *Ward v. Neal*, 37 Ala. 500; *Powell v. Sims*, 5 W. Va. 1; *Stein v. Hauck*, 56 Ind. 65; *Ray v. Sweeney*, 14 Bush, 1.

² 24 Iowa, 35 (1867).

³ 1 Green Ch. 57 (1838).

⁴ 31 N. J. Eq. 217.

⁵ 1 La. Ann. 407 (1846).

⁶ 1 Sumn. 402.

⁷ 24 Am. Law Reg. N. S. 6 (1875).

the English and American decisions on this subject, adopted the English law, and restrained by injunction the defendant from erecting a building on a vacant lot, which might darken the complainant's windows.

In *Gerber v. Grabel*¹ the marginal notes would indicate that the English rule was approved, and the case is often so cited; but a careful examination of the case shows that this was not necessarily the point of the decision. The action was for wrongfully obstructing the plaintiff's light, but the declaration did not allege on *what ground* the plaintiff claimed the right, whether by prescription, express grant, or implied grant, and judgment below having been arrested, on a verdict for the plaintiff, this decision was reversed and judgment on the verdict; because, said the court, "the plaintiff might have proved a prescription under our common law, as we have laid it down, or he might have proved an express grant; or he might have proved circumstances from which a grant or estoppel would be presumed without regard to length of use. We must presume the proofs warranted the verdict, and there is nothing in the verdict contrary to law." But Judge Scates had already said, after stating the English rule, "but such is not the rule of the common law of Illinois, as I shall proceed to show;" and he continues, "while we highly respect the learned decisions of English courts adopting an analogous rule to their statute of limitations, we must bow to the authority of these older rulings (which he had before cited as not supporting the doctrine of prescription), with liberty to say that a twenty years' prescription for the easement of light and air is not applicable to the circumstances of this state, unsettled and unimproved as it is;" and he cites with approbation *Parker v. Foote*, 19 Wend. 309, and other cases on the same side. And from the recent case of *Guest v. Reynolds*, 68 Ill. 478, we do not understand Illinois to be in favor of the English rule. Precisely the same point arose in *Ward v. Neal*,² namely, that a general averment of the right to light might be good as a *matter of pleading*, upon demurrer, since under that allegation the right might be proved to have arisen from ex-

¹ 16 Ill. 217 (1854).

² 35 Ala. 602 (1860).

press grant, as well as by prescription. But when the case came again before the court upon the facts, setting up an adverse user merely, the English rule was expressly denied and the American adopted: 37 Ala. 500 (1861). And nothing in *Ray v. Lynes*¹ sanctions a different opinion, though it is sometimes cited as doing so.

In view of the course of our decisions on this question, we think it may be reasonably concluded that, *notwithstanding some early opinions to the contrary, it cannot now be safely asserted that the doctrine of a right to light and air by a mere prescriptive use prevails at present in a single American state, unless Delaware be an exception.*

PREScription ACT.

It has already been remarked that the Prescription Act makes special provision for the acquisition of rights to light, and the third section of that act, which relates exclusively to the acquisition of rights to light, has been set out at length." To enable a right to light to be acquired under the provisions "Actual" of that section, the statute requires *actual* enjoyment. enjoyment. ment for the full period of twenty years, and a question has arisen whether the statute is satisfied, and whether a right is gained, if a house is built and the windows put in, but if the decorative and internal portion of the house is so unfinished as to render the house uninhabitable, and if, in fact, the house is uninhabited during the prescriptive period. It has been held that under such circumstances the statute is satisfied, and that the right can be acquired; for that no occupation, in the sense of personal occupation, is necessary to constitute actual enjoyment within the meaning of the Act."

It appears that there was formerly a custom in the city of London, that any owner of a house, or of ancient foundations of a house, in that city, might at his pleasure raise the house, or build a new house on the ancient foundations, though he thereby obstructed the light which had been accustomed to enter the ancient win-

¹ 10 Ala. 63 (1846).

^v *Ante*, p. 137.

^w *Courtauld v. Legh*, L. R. 4 Exch. 126; 38 L. J. Exch. 45.

dows of the adjoining house. This custom was abrogated by the third section of the Prescription Act, which creates an absolute and indefeasible right to light after enjoyment for twenty years, *any local usage or custom to the contrary notwithstanding.*^x

The third section of the Prescription Act, which relates solely to rights to light, differs materially from the second in its form. The second section of the act says that when the easements therein mentioned have been actually enjoyed by any person claiming right thereto, without interruption, for the full period of twenty years, no claim to those easements is to be defeated by showing only that they were first enjoyed at any time prior to such period of twenty years, that is, by showing the commencement of the user, so as to negative immemorial user, as could be done if the claim was made by prescription at common law, but that the claim may be defeated in any other way by which the same would have been liable to be defeated before the act was passed; the third section, on the other hand, says that when the access and use of light to and for any dwelling-house shall have been actually enjoyed therewith for the full period of twenty years, without interruption, the right thereto is to be deemed absolute and indefeasible. It has been already pointed out that to support a claim to an easement by prescription at common law, it is essential that a grant should be capable of being presumed, and that no alteration was made in the law in this respect by the second section of the Act; but it is not so, owing to the peculiar form of the third section of the statute, in the case of claims to rights to light. The change that was effected by the Prescription Act in the case of claims to rights to light, was first observed in the case of *Truscott v. Merchant Taylors' Company*,^y in which Coleridge, J., said: "The case turns upon the construction to be put on section three of Lord Tenterden's

Prescriptive rights to light now depend solely on the statute.

^x *Truscott v. Merchant Taylors' Co.* 11 Exch. 855; 25 L. J. Exch. 173; *Salters' Co. v. Jay*, 3 Q. B. 109; 11 L. J. Q. B. 173.

^y 11 Exch. 855; 25 L. J. Exch. 173; *Frewen v. Phillips*, 11 C. B. N. S. 449; 30 L. J. C. P. 356.

Act, which is addressed merely to the question of access of light. That section simplifies, and almost new founds, the right to access of light. It founds the right upon the actual enjoyment for the full period of twenty years without interruption, unless that enjoyment be shown to be had under a consent in writing. It puts the right, therefore, on the simplest foundation, with the simplest exception." After this decision, the case of *Tapling v. Jones*² arose, which was carried to the House of Lords. This is an extremely important case, as it entirely reversed the existing notions of the law relating to the right, or supposed right, of a servient owner to block up ancient lights, if the owner of them opened new windows which could not be obstructed without at the same time obstructing the ancient lights. More will be said on that point hereafter, but besides that, some most important principles of law relating to rights to light, and regarding the opening of windows overlooking a neighbor's land, were explained in the judgments of the lords. Among these, a principle was laid down, entirely affirming the opinion of Coleridge, J., on the effect of the Prescription Act upon prescriptive rights to light. The lord chancellor said that "the right to what is called an 'ancient light' now depends upon positive enactment: it is matter *juris positivi*, and does not require, and therefore ought not to be vested, on any presumption of grant or fiction of a license having been obtained from the adjoining proprietor. Written consent or agreement may be used for the purpose of accounting for the enjoyment of the servitude, and thereby preventing the title which would otherwise arise from uninterrupted user or possession during the requisite period. This observation is material, because I think it will be found that error in some decided cases has arisen from the fact of the courts treating the right as originating in a presumed grant or license."

Doubts
whether
prescrip-
tive rights

Although *Tapling v. Jones* was a decision of the House of Lords, there have been cases in which the soundness of the principle there laid down that prescriptive rights to light now depend solely upon the Prescrip-

² 11 H. L. C. 290; 34 L. J. C. P. 342.

tion Act has been doubted, and although these opinions cannot, it is presumed, override a decision of the House of Lords, they are of such weight, and the subject is of such importance, that they demand special notice. The first case of this kind was *Lanfranchi v. Mackenzie*,^a when Malins, V. C., said he did not understand the Prescription Act to have made any difference in the principle on which rights to light are acquired by prescription, and that he only read the statute as meaning that there was no absolute period for acquisition of a right to light before the statute, but that now the period is fixed at twenty years, and that all the cases since the act was passed had been decided upon the ancient principles of law. So also in *Aynsley v. Glover*,^b the lords justices expressed similar views. The bill in that case was filed for an injunction to restrain interference with light, and Mellish, L. J., in his judgment, in which James, L. J., concurred, said: "In my opinion it is unnecessary to consider whether the plaintiff could have made out his right under the statute 2 & 3 Wm. IV. c. 71, because I am of opinion that under the circumstances of the case the plaintiff has clearly made out a right from time immemorial. The statute 2 & 3 Wm. IV. c. 71, has not, as I apprehend, taken away any of the modes of claiming easements which existed before that statute. Indeed, as the statute requires the twenty years, or forty years (as the case may be), the enjoyment during which confers a right, to be the twenty years or forty years next immediately before some suit or action is brought with respect to the easement, there would be a variety of valuable easements, which would be altogether destroyed if a plaintiff was not entitled to resort to the proof which he could have resorted to before the act was passed."

to light
now de-
pend solely
on the
statute.

Another point of difference between the second and third sections of the Prescription Act is, that in the former section the easements are required to have been enjoyed "as of right" during the prescriptive user, but the latter section does not make that requisition. It was

Enjoyment
"as of
right."

^a L. R. 4 Eq. at p. 426; 36 L. J. Ch. at p. 522.

^b L. R. 10 Ch. App. 283; 44 L. J. Ch. 523.

thought in the case of *Harbidge v. Warwick*,^c that although there is a difference in the form of the second and third sections of the Prescription Act, the user in each case ought to be the same, for that although the forms of pleading given in the fifth section as applicable to actions of trespass are not commonly applicable to cases of claims to light, yet that they may be, for if in an action for demolishing a wall which would be an action for trespass, a claim of right to light should be set up by way of justification for the demolition, it would be necessary to state in the plea that the light had been enjoyed *as of right* for twenty years. It was therefore argued that the proof of enjoyment must be the same, whether it is put forward as part of the defence in an action for trespass for removing an obstruction, or as part of a complaint in an action on the case for causing an obstruction—that is, the light in either case must be proved to have been enjoyed “as of right.” The notion, however, that the Prescription Act really requires light to have been enjoyed “as of right,” though it does not say so, has not generally prevailed, and in more recent cases than that above mentioned the reverse has been decided; thus, in the case of *Truscott v. The Merchant Taylors’ Company*,^d Cresswell, J., said in his judgment: “It appears to me that Parliament in this statute has been actuated by a desire to settle titles and rights, especially in the third section. By this section a person who has the access of light for the full period of twenty years without interruption obtains a right to it. The statute does not say a person who has enjoyed it *as of right*, for every one has a right to open a window in his own soil.” This opinion of Cresswell, J., was approved by Pollock, C. B., when delivering the judgment of the Court of Exchequer Chamber in *Frewen v. Phillips*,^e in which he said: “Now, although that case was not precisely the case now before us, yet it recognizes that it was the intention of the legislature to adopt a simple and short period for the acquisition of the right to light, *and that it need not be*

^c 3 Exch. 552; 18 L. J. Exch. 245.

^d 11 Exch. 855; 25 L. J. Exch. 173.

^e 11 C. B. N. S. 449; 30 L. J. C. P. 356.

enjoyed as of right ;" and Maule, B., in the case of *Flight v. Thomas*,^f also expressed an opinion that the words "claiming right thereto" were purposely omitted in the third section of the act. As then the enjoyment in the case of claims to light is not required by the act to have been "as of right," those claims may be sustained even though the enjoyment was had by permission, and although rent or an annual sum has been paid for permission to enjoy the light.^g

From the recent interpretation of the act it would seem also that claims to light may be sustained, although the servient owner has been incapable of resisting the enjoyment of the light — as, for instance, when the servient tenement has been in the occupation of a tenant during the whole prescriptive period ;^h but some doubt may exist whether, on further consideration, the fact that the servient owner has been incapable of resistance would not be held to prevent the power of acquiring a right to light by prescription as much as it would prevent the acquisition of any other easement, for the statute requires the light to have been enjoyed without interruption, and it may be said that that expression implies that there must be a power of interrupting.ⁱ

Capability
of resisting
enjoyment.

Although light need not, to satisfy the statute, be enjoyed "as of right," yet it must be enjoyed in the character of an easement — that is to say, the right cannot be acquired if the enjoyment has existed during unity of ownership of the dominant and servient tenements. This appears to be the case, as the statute requires the light to have been enjoyed without interruption, and therefore seems to contemplate an enjoyment that could be interrupted by the owner of the adjoining land, at least during some part of the prescriptive period, and an interruption could not oc-

Enjoyment
in character
of an
easement.

^f 11 A. & E. at p. 695 ; *Mayor of London v. The Pewterers Co.* 2 Moo. & Rob. 409.

^g *Plasterers' Co. v. Parish Clerks' Co.* 6 Exch. 630 ; 20 L. J. Exch. 362.

^h *Simper v. Foley*, 2 John. & H. 555.

ⁱ *Harbidge v. Warwick*, 3 Exch. 552 ; 18 L. J. Exch. 245.

cur if the servient tenement is during the whole prescriptive period in the occupation of the claimant of the easement.^j

A right to unobstructed light and air can only be acquired by prescription for the benefit or in respect of build-
Light to open ground. ings; such a right cannot be so acquired for open ground. This was first determined in the case of *Roberts v. Macord*^k at nisi prius, when it was held that no right to have the air unobstructed could be acquired by prescription in respect of a timber yard and saw-pit, and that the mere fact of having an open saw-pit in a yard, and laying timber there to dry (for which purpose it was desirable the air should have free access to the yard), for twenty years, was not sufficient to raise a presumption of a grant. Independently, however, of the cases in which this rule of law is upheld on principle, it should be noticed that the Prescription Act provides for the acquisition of rights to light only when the access and use of light to *any building* shall have been enjoyed for twenty years, and that nothing is said which can by any possibility extend this mode of acquiring the right to a saw-pit or a garden.

A question of much importance to shopkeepers who display goods for view in their windows relates to their
Light to shop-windows. right to have the light falling uninterruptedly on the goods there displayed. The point was mentioned incidentally by Wood, V. C., in the case of *Smith v. Owen*,^l which was a suit for an injunction to restrain the owner of a house in Bond Street from extending his building forward so as to exclude the light from an adjoining shop window. It appeared from the evidence, however, that the effect of the building would be merely to prevent persons approaching from seeing the shop so far down the street as was then possible, but that the light would not be obstructed. The vice chancellor said, that so far as a person standing outside the window would be prevented from getting a view

^j *Harbidge v. Warwick*, 3 Exch. 552; 18 L. J. Exch. 245; *Ladyman v. Grave*, L. R. 6 Ch. App. 763.

^k 1 Moo. & Rob. 230; *Potts v. Smith*, L. R. 6 Eq. 311; 38 L. J. Ch. 58.

^l 35 L. J. Ch. 317 (not elsewhere reported). See *Hall v. Evans*, 42 Up. Can. Q. B. 190.

of the goods there exhibited, the case would stand on the same footing as an obstruction to light; a person must not commit an injury in creating such an obstruction; and that, if a shopkeeper wished to show his goods within the shop, he had a right to the free access of light for that purpose, and he apprehended it was the same if he wished to show the goods outside by means of a transparent medium.

Another question of some nicety with regard to the power of acquiring rights to light has reference to the acquisition of rights to light for purposes of an unusual or extraordinary character, or for purposes requiring an unusual amount of light. The law on this subject is not very clear, but it would seem from the following case that a right to extraordinary light may be acquired by prescription, if the purpose for which it is required has existed openly, and to the knowledge of the party against whom it is claimed, for twenty years. *Lanfranchi v. Mackenzie*^m was a suit for an injunction to restrain building in such a manner as to obstruct light. The plaintiffs were silk merchants, and the window said to be darkened belonged to the sample-room of their warehouse. It was said by the plaintiffs that a steady uniform light was necessary for a room used as a sample-room for the purpose of examining raw silk, and that the room had, prior to the building, enjoyed a good steady light, well-suited for the purpose, and that a considerable change for the worse had ensued in consequence of the building. It is to be observed that Malins, V. C., in his judgment, treats the right to light gained by prescription as still depending upon the presumption of a grant, ignoring the House of Lords' decision in the case of *Tapling v. Jones*, of which much has already been said. After considering the evidence, he continued: "Then I come to the second, and perhaps the still more important question, whether I should be justified in interfering upon the ground of the extraordinary purpose to which this room has been applied. Now, in order to arrive at a conclusion upon that subject, I think one must look a little at the principles

Extraordinary light for special purposes.

^m L. R. 4 Eq. 421; 36 L. J. Ch. 518; *Herz v. Union Bank of London*, 2 Gif. 686.

upon which this rule as to ancient lights is established. Mr. Glasse has referred me to a case of *Jones v. Tapling*, and has argued that it now depends not on the common law or the ancient principle, but upon the statute. I do not understand the statute to have made any difference. I only read the statute as meaning this (and I believe it has been uniformly so read), that there was no absolute period theretofore, but now the period is fixed at twenty years." "The cases since that statute has proceeded upon the same principle as before; namely, that in order to establish the right to an ancient light you must show that there has been an undisturbed peaceable enjoyment. Mr. Watkin Williams put it, I think, with perfect accuracy in his argument. There must be an open, peaceable, undisturbed enjoyment for the period of twenty years. Now what is this enjoyment? If a man has the use of a window for ordinary purposes, he is entitled to have it for all the purposes for which he has enjoyed it; but it does not follow that because he has used it for a particular purpose for less than twenty years that he therefore can establish his right to such particular user for that particular period." "As I understand the law, and as I intend to act on it, it is this, that unless you can show there has been that open, uninterrupted enjoyment of the light in the manner in which it is at present enjoyed for twenty years, there is no right whatever to interfere with the proceedings of the neighbor. Now in this case it has been argued, and I think Mr. Glasse carried his argument to that extent, that, assuming for the sake of the argument there would be no right in the plaintiff to come for the interference of the court on the ground of the ordinary use of this property, directly it is turned to an extraordinary use — such as a room for a painter, for an artist, or for examining diamonds by a diamond merchant, or, as in the present case, examining silks by a silk merchant — you have a right so to interfere with the proceedings of the neighbor, that a building which he might have erected, if it had not been for this particular use of the light, he has no longer a right to erect. But then the rule comes into operation that it must be an open, well known, and uninterrupted user." The vice

chancellor ultimately said that user of light for an extraordinary purpose for twenty years would establish the right against all persons who had a reasonable knowledge of it, but that it was unnecessary to say what would be the result if the party against whom the right was claimed was not aware of the extraordinary purpose for which the light was used. It should be particularly remembered, when reading this judgment, that the vice chancellor starts with the assumption that the old principle of presumption of a grant was not abrogated by the Prescription Act, for if, according to the principle laid down by the House of Lords in *Tapling v. Jones*, the right to light now depends entirely on the statute, and not on any presumption of a grant, it would seem that twenty years actual user of light for a particular and extraordinary purpose would confer a right to the extraordinary amount of light, notwithstanding the servient owner was ignorant of the particular purpose for which the light was used.

Whatever may be the law relating to prescriptive rights to light for unusual purposes, a right to an extraordinary quantity of light for a particular purpose may doubtless be acquired by grant, actual or implied; and if a person carries on, or is about to carry on, a particular business, requiring an unusual quantity or quality of light, to the knowledge of a lessor or vendor of a house, who lets or sells the house for that purpose, a grant of right to that light will probably be implied against the lessor or vendor."

One other point may be gleaned from the judgment in the case of *Lanfranchi v. Mackenzie*, namely, that no right can be acquired that the amount of light accustomed to enter a window shall not be increased

Light increased by reflection.

by reflection. It appeared in that case that as the sun, towards the afternoon, got round to the west, the light struck the heightened part of the opposite buildings, and from that time an increased amount of light was thrown into the opposite windows, and that this reflected light was glaring and unsteady, and consequently unsuited for the purpose of examining the silks in the accustomed manner. The vice chan-

cellor said that no case had ever occurred in which the court had interfered to prevent a person erecting a building, the effect of which would be to increase the quantity of light, and that he apprehended no such case could occur; at all events, he would not be the first judge to come to such a decision.

AMERICAN PRESCRIPTION ACTS.

In some American states a brief Prescription Act, as it may be called, exists, declaring that "no person shall acquire a right of way, or other easement, from, in, upon, or over the land of another, by the adverse use or enjoyment thereof, *unless* such use has been continued uninterrupted for twenty years."¹ It has frequently been argued that such statutes impliedly give a right to light when the use has continued that length of time; but it has uniformly been held by those courts which deny the acquisition of such right at common law, that it could not be gained by force of the statute; that the statute did not mean to create new rights affirmatively, but rather to restrict and limit, if need be, those which would otherwise be acquired at common law.²

SUPPORT.

It has already been explained that the right to support for *land*, while it remains in its natural condition, is a natural right, and that, as such, it is a right incident to the ownership of land, and is not acquired by any act of man. Of easements connected with support there are several kinds — as the right to support for land when its natural condition has been changed by excavation, for instance; and the right to support for buildings; but, besides these, there is a right which may be acquired, entitling a land or mine-owner to remove the support to which another landowner would ordinarily be entitled by natural right. This right, antagonistic to the natural right, is also an easement.

These easements may generally be acquired in the same manner as others — that is, by grant, express or implied, or

¹ Mass. Gen. Sts. c. 90, § 33.

² *Pierre v. Fernald*, 26 Me. 436; *Stein v. Hauck*, 56 Ind. 65.

by prescription ; but it will be shown that there are some cases in which the easement can be acquired by grant only, and not by prescription. As regards prescription, it is questionable in all cases whether the right to support is an "easement" within the meaning of the Prescription Act, so as to be capable of acquisition under the statute, or whether the right can be acquired by prescription at common law alone. And it has recently been decided it cannot.¹ This point has already been considered in another part of this work.^o

Whenever land is sold, there is an implied grant of right to support for that land by the vendor, if he reserves either the subjacent mines or the adjoining soil. It is undisputed that if the land sold is in its natural condition — that is, unexcavated and without any artificial weight imposed by buildings — the purchaser is entitled by natural right to support for his land. The natural right is good, not only against the vendor but against strangers, who possess the land adjacent, or the subjacent mines, but the grant of right to support is additional to the natural right, and can be implied against the vendor alone. If a man makes a grant of surface land, and, with it, of the use and benefit to be derived from its possession, he is guilty of an act in derogation from his grant if he removes the subsoil and destroys the possibility of enjoyment, and he is liable to an action for any damage he may cause. It should also be remarked that a reservation of subjacent mines, on a sale of land, with power for the vendor to gain the minerals, does not, in the absence of express stipulation, deprive the purchaser either of his natural right to support for his land, or the benefit of the implied grant ; for the meaning of the reservation is that all the minerals may be excavated by the vendor of the land, but that the purchaser of the surface is not to be deprived of the use of his ground by removal of all

How acquired.

Implied grant on sale of land reserving the subsoil.

¹ See *Angus v. Dalton*, 3 Q. B. D. 85 ; on appeal, 4 Ib. 162, the principle was not impugned, but a majority of the court thought it not applicable to the particular facts of that case. See *post*.

^o *Ante*, p. 140.

support.^p And this reasonable rule has been adopted in America.¹ A deed, however, may be framed in such a manner as to empower the owner of the minerals to remove the whole of them, without subjecting himself to any liability for damage done to the surface by subsidence or subject to payment of compensation for injury.^q

Though the law as to right to support is thus pretty clear when the surface land is sold and the subjacent soil is reserved, it seems far from clear whether there is any such right for the surface owner if the subsoil is granted away and the surface is reserved. Questions of this kind are most likely to arise, and in fact have arisen, in the case of mining leases, which of course are very numerous, and it is somewhat remarkable that, considering the number of these leases that is made and how frequently subsidence of the surface over the mines must occur, that so few cases have been brought before the courts for the determination of the respective rights of the surface owners and the mining lessees. If the subsoil be separated by grant from the surface, there seems no doubt that *primâ facie* the same *natural right* to support exists, whether it is the surface or the subsoil which is granted; but if the subsoil is granted and the surface is reserved it is a matter of considerable doubt whether there is any *implied grant* by the purchaser of the subsoil of a right to support for the surface *in addition to the natural right*, that is assuming there are no words in the deed affecting the question. There is no doubt

^p Harris v. Ryding, 5 M. & W. 60; 8 L. J. N. S. Exch. 181; Smart v. Morton, 5 E. & B. 30; 24 L. J. Q. B. 261; Proud v. Bates, 34 L. J. Ch. 406 (not elsewhere reported).

¹ See, exactly in point, Jones v. Wagner, 66 Penn. St. 429 (1870); Horner v. Watson, 79 Ib. 243; Coleman v. Chadwick, 80 Ib. 81, which also held that a custom to the contrary is invalid. And see Hext v. Gill, L. R. 7 Ch. App. 699; Smith v. Darby, L. R. 7 Q. B. 716; Marvin v. Brewster Iron Mining Co. 55 N. Y. 538, containing a valuable opinion by Judge Folger.

^q Aspden v. Seddon, L. R. 10 Ch. App. 394; 44 L. J. Ch. 359. See, also, Same v. Same, 1 Exch. D. 496; Ryckman v. Gillis, 57 N. Y. 68; Caldwell v. Fulton, 31 Penn. St. 475.

that it may be a matter of very considerable moment to the grantor whether there is any such right reserved to him by implied grant or not, for the natural right to support is limited to the support of the soil in its natural state, and does not apply to any buildings with which the soil is weighted, but if there is any such right by implied grant or reservation, it would relate alike to the land and to any buildings that had been erected upon it. Considering the matter in its simplest form, as a mere grant of the subsoil, apart from any question of mining, it would seem on principle, and by analogy to other cases of grants, that no right to support for the surface is reserved to the grantor by implication and in addition to his natural right to support; for if a man makes an absolute and unlimited grant of the subsoil, why is it to be implied that his grant is saddled with a material restriction, and that the grantor is not to use that subsoil in any manner that it is to his interest to use it? To allow a grantor to set up such a restriction would be to allow him to derogate from his grant.¹ The same reason, moreover, exists against such an implied reservation as that which prevents a grantor of a house building on land he reserves so as to obstruct the lights of the house.* In cases of mining leases, however, which are grants for the express purpose of the removal of ^{Mining leases.} the subsoil, the respective rights of the parties as regards the removal of the support from the surface usually depend in each case upon the terms of the lease; but it may be taken as the general rule of law, that if there is nothing in a lease of mines to oblige the lessee to leave sufficient coal or other material for the support of the surface land, he is under no obligation to do it. *Eadon v. Jeffcock*² was a case in which this question arose and the law was very fully considered, and the principles to be gathered from that case are, that when the property in the soil and in the subjacent minerals belongs to

¹ See *Siddons v. Short*, 2 C. P. D. 672.

* *Ante*, p. 191.

² L. R. 7 Exch. 379; 42 L. J. Exch. 36; *Dugdale v. Robertson*, 3 K. & J. 695; *Taylor v. Shafto*, 8 B. & S. 228; *Smith v. Darby*, L. R. 7 Q. B. 716; 42 L. J. Q. B. 140.

different persons, and there is no deed or other matter to influence the rights of the parties, each must use his own property in such a manner as not to injure the other, and the right to this mutual protection is a natural right. Included in this natural right is the right of the surface owner to support for his land so long as it remains in its natural condition. If, however, the owner of land grants a mining lease and expressly gives power to the lessee to remove the subjacent minerals, it becomes a question which can be determined only by the terms of the lease, whether the lessee is to be entitled to remove the whole of the subjacent minerals, regardless of the damage he may do to the surface by causing it to subside, or whether he is bound to leave pillars of coal or to put artificial supports to keep the surface in its natural state.

While considering the right of an owner of subsoil to excavate in such a manner as to let down and damage the surface land by subsidence, it is proper to notice that such an easement cannot be acquired under a custom, for it would be unreasonable;† neither can it be acquired by prescription, for the act of digging is a lawful act which the person entitled to support has no power of resisting, and the excavation of minerals by a mine-owner does not require the performance of any act on the servient tenement, nor that the servient owner shall refrain from doing anything on his own land, and it has been shown that under such circumstances no prescriptive title can arise, because no grant of the right can be presumed.”

A right to excavate and thereby to destroy the support to which a surface owner has a natural right may of course be acquired under an act of parliament, and rights of this kind frequently arise under Inclosure Acts and awards made under their authority.”

A copyholder cannot bind his copyhold land by a grant of

† *Hilton v. Earl of Granville*, 5 Q. B. 701; 13 L. J. Q. B. 193; *Wakefield v. Duke of Buccleuch*, L. R. 4 Eq. 613; 36 L. J. Ch. 763; *Blackett v. Bradley*, 1 B. & S. 940; 31 L. J. Q. B. 65.

“ *Blackett v. Bradley*, 1 B. & S. 940; 31 L. J. Q. B. 65.

” *Rowbotham v. Wilson*, 8 H. L. C. 348; 30 L. J. Q. B. 49; *Roberts v. Haines*, 7 E. & B. 625; 27 L. J. Exch. 49.

right to an adjoining landowner to excavate and remove all necessary support, and such a grant is void as against a subsequent freeholder if the land is enfranchised ;^w and it is apprehended that such a grant would also be void as against the land previously to enfranchisement.

There is an exception of an important character to the rule of law entitling a purchaser of land to support. The Lands and Railways Clauses Consolidation Acts, 1845, made various provisions relative to the acquisition of lands for the making of railways ; and among other things, it is enacted by the latter act (sections 77, 78, and 79) that railway companies shall not be entitled to any mines under land purchased by them, and that subjacent mines shall be deemed to be excepted out of conveyances of lands unless they are expressly conveyed ; that if the mine-owners are at any time desirous of working the mines, they are to give notice to the companies thirty days before commencing operations, and the companies may then cause the mines to be inspected ; if the working would be likely to produce injury to the railways, the owners are prohibited working the mines, but the companies must pay them compensation for their loss ; but if the companies are unwilling to purchase the mines the owners may work them in a manner proper and necessary for the beneficial working, according to the usual manner of working mines in the district where they are situate. These provisions have given rise to a very important question as to the right to support, for it has been urged on the part of railway companies that when mine-owners have sold surface land to them, they are entitled to the same support, both by natural right and by implied grant, as any other purchaser of land ; but, after much argument, it has been determined that companies were by the statute placed on an entirely different footing from ordinary purchasers, for that it was obviously the intention of the legislature to create a new relation between vendors and purchasers under the act, and to get rid of all the ordinary law on the subject ; that it was highly beneficial for companies to be en-

Exception:
Railway
Clauses
Consolida-
tion Act.

^w Richards v. Harper, L. R. 1 Exch. 199 ; 35 L. J. Exch. 130.

abled to purchase the surface of land only, without being compelled to buy the mines also, and that the legislature intended the land to be dealt with just as if there were no mines to be considered, so that when the owners wished to work the mines they should be just in the same position as if they had never sold any part of their land to the companies.^x The same principle is applicable to sales of land under other acts of parliament, if their provisions are similar in character to those of the Railways Clauses Act, 1845.

If, prior to the conveyance of surface land to a company under the Railways Clauses Act, Cockburn, C. J., remarked, in the Exchequer Chamber,^y there was any separation of the surface land from the minerals, the right of support which then existed would no doubt belong to the company.

If water, from natural causes or from accidents, finds its way underground, either into excavations or into ordinary subterranean channels, it frequently affords considerable support to the soil above by its natural upward pressure. When this is so it becomes an important question whether the owner of the surface has a natural right or can acquire a right to that support, so as to entitle him to restrain the owners of adjoining land or subjacent mines from draining or pumping away the water. It is now decided that he neither has, nor can he acquire (except possibly by grant), any such right. The first case in which this question arose was *Elliot v. North Eastern Railway Company*,^z in which it appeared that there was an ancient shaft leading down to a

^x *Great Western Railway Co. v. Bennett*, L. R. 2 H. L. 27; 36 L. J. Q. B. 133; *Great Western Railway Co. v. Fletcher*, 5 H. & N. 689; 29 L. J. Exch. 253; *London and North Western Railway Co. v. Ackroyd*, 31 L. J. Ch. 588 (not in the Reports); *Stourbridge Canal Co. v. Earl of Dudley*, 3 E. & E. 409; 30 L. J. Q. B. 108; *Dudley Canal Co. v. Grazebrook*, 1 B. & Ad. 59; 8 L. J. K. B. 361.

^y *Great Western Railway Co. v. Fletcher*, 5 H. & N. at p. 689.

^z 10 H. L. C. 333; 32 L. J. Ch. 402. It has been already shown that, though there is no natural right to support for surface land by underground water, yet that, if underground water supports the water of a flowing stream, it cannot be drawn off so as to cause a diminution of the water of the stream. *Ante*, p. 40.

coal-pit, in which there were sundry horizontal passages leading under adjoining land, and that a river, having overflowed its banks, filled the shaft and the passages with water, and then the natural consequence arose that there was a certain upward pressure from the water, by which the land was to a considerable degree supported. It was held that, under the circumstances of the case, no right could be acquired to this kind of support, for that the flooding was accidental, and that it was only reasonable to suppose that at some future time the owner would resume the working of the mine. A somewhat similar point arose in the recent case of *Popplewell v. Hodgkinson*,^a in which the facts were that the plaintiff was owner of some land of a wet and spongy character, upon which he built some houses of a very bad construction. The defendant was a builder, and by excavating in the adjoining land for the purpose of building a church, drained the water which stood under the land of the plaintiff, the surface of which sank in consequence, and the houses cracked. The question in the action was whether the defendant was responsible for the injury. It was held in the Exchequer Chamber that he was not, for that there could be no right natural or by prescription that the water should not be withdrawn, though it might happen that such a right could be acquired if the act of draining would be in derogation of a grant express or implied.

SUPPORT FOR BUILDINGS.

The easement of support for buildings is of two kinds, namely, support from the subjacent and adjacent soil, and support from adjoining buildings; and some difference exists between these rights, inasmuch as it is doubtful whether a right to lateral support for one building from another can be acquired by prescription.

A right to support for buildings, both from the subjacent and adjacent soil and from adjoining buildings, may be acquired by grant, express or implied. This right arises by implied grant, in the absence of express stipulation, in every case where an owner of adjoining houses,

Right by
implied
grant.

^a L. R. 4 Exch. 248; 38 L. J. Exch. 126.

or of houses and land, severs the property by sale, for in every such case rights to support are granted by implication, by the vendor and purchasers respectively, for the preservation of the buildings belonging to each other.^b

IN AMERICAN COURTS

the same principle is adopted. *Partridge v. Gilbert*,¹ in the New York Court of Appeals, 1857, is the leading Party walls. case on that subject. It was there held, after careful consideration, that if the owner of two adjoining houses, having a common party wall, conveys the houses to different grantees, making the centre of the wall the dividing line between them, each grantee acquires a right of supporting his house by the part of the wall conveyed to the other; which right remains so long as the wall continues sufficient for that purpose, and the buildings continue to need and enjoy such support; but if one house becomes dilapidated and unsafe for occupation, and the removal of the other walls thereof would occasion the destruction of the *whole* party wall, the owner of the dilapidated building may, after reasonable notice, take down the whole party wall and erect a new one in its place, giving the same support to the other as formerly; and if he occupy no unreasonable time in so doing, and uses proper care and skill, he is not responsible to the other for damages to his house from exposure to the weather, or loss of rent or business during the interval. But if the party wall needs no repair, and one owner wishes to build it higher, or make additions to it, he must do so at his peril, and he is liable if injury results to the other, in so doing.² But the erection of a party wall

^b *Richards v. Rose*, 9 Exch. 218; 23 L. J. Exch. 3; *Murchie v. Black*, 19 C. B. N. S. 190; 34 L. J. C. P. 337. See, also, the recent case of *Aspden v. Seddon*, 1 Exch. D. 496.

¹ 15 N. Y. (1 Smith), 601, affirming the decision below, in 3 Duer, 185. See, also, *Crawshaw v. Sumner*, 56 Mo. 517; *Dowling v. Hennings*, 20 Md. 179; *Rogers v. Sinsheimer*, 50 N. Y. 646; *Eno v. Del Vecchio*, 4 Duer, 53; *Webster v. Stevens*, 5 Duer, 553. But see *Hieatt v. Morris*, 10 Ohio St. 523.

² *Brooks v. Curtis* 50 N. Y. 639. And see *Eno v. Del Vecchio*, 6 Duer, 17.

by an agreement between two adjoining tenants for years, whose leases do not authorize the construction of a party wall, does not bind the lessor, and he, after the lease has expired, deals with the property as if no such wall had been erected, and so may his grantee.¹ And although the deed of one house may include the whole party wall, and even two inches beyond, yet the other grantee obtains an easement in the wall, if it be a party wall, and in the two inch space beyond it.² And if it be a *solid* party wall, one owner has not a right to take down the part on his side and rebuild it separated from the other part, and connected with it by ties or bricks "toothed into" it; for that may not be as strong as the original solid wall, to which the other was entitled.³

A right to support for buildings from adjacent land or subjacent soil may be acquired by prescription at common law, though probably, as was before pointed out, the right to support is not an "easement" within the meaning of the Prescription Act, so as to render it capable of being acquired under the statute.⁴ It was also shown that a question has been raised whether the natural right to support for surface land from the subjacent soil does not extend to buildings erected on the land; there is, however, not sufficient authority to support that view, and the probability is that it would not be upheld if the point were fully argued; but there can be no doubt that a right to support from subjacent and adjacent soil can be gained by prescription at common law, and that the law will recognize the right when buildings have stood for twenty years, if they have received support to the knowledge both of the owner of the buildings and of the land during that period.⁵ If buildings are situated

Right by
prescription.

¹ Webster v. Stevens, 5 Duer, 553.

² Rogers v. Sinsheimer, 50 N. Y. 646. One who builds a party wall partly on another's land, with his knowledge and consent, acquires a right or easement to continue it. Miller v. Brown, 33 Ohio St. 547.

³ Phillips v. Bordman, 4 Allen, 147.

⁴ See Angus v. Dalton, 3 Q. B. D. 84.

⁵ Hide v. Thornborough, 2 Car. & K. 250; Partridge v. Scott, 3 M. & W. 220; 7 L. J. N. S. Exch. 101; Rogers v. Taylor, 2 H. & N. 828; 27 L. J. Exch. 173.

on ground from under which the minerals have been excavated, so that they require more support from the adjacent soil than they otherwise would, a right to support cannot be established unless it is shown that the excavations have existed for twenty years. This point arose in the case of *Partridge v. Scott*,^d in which Alderson, B., who delivered judgment, treated the right to support by prescription as originating in a supposed grant; but whether any grant can be presumed in cases of right to support will be considered presently. The learned judge there said that if the land on which the plaintiff's house stood had not been previously excavated, the defendants might without injury have worked their coal to the extremity of their own land, and if the plaintiff had not built his house on excavated ground, the mere sinking of the ground would have been without injury. The plaintiff, therefore, by so building, produced the injury without any fault on the part of the defendant, unless at the time, by some grant, he was entitled to additional support from the land of the defendant. He added that no grant could be inferred in the case before the court, because, though the house had stood more than twenty years, it did not appear that the coal under it might not have been excavated within twenty years, and that no grant could be inferred until after the lapse of at least twenty years from the time when the house first stood on excavated ground, and was supported in part by the adjacent ground of the defendant.

It is somewhat difficult to see how any grant can be presumed to have been made so as to render a right to support capable of being gained by prescription, merely from the circumstance that a house has stood for twenty years supported by the neighboring soil. It has just been noticed that in the case of *Partridge v. Scott*, the right was treated by Alderson, B., as resulting from a presumed grant, and it has been so treated in other instances, but the point has on several occasions received consideration. In *Humphries v. Brogden*,^e the difficulty was noticed, for Lord

How can a grant be presumed.

^d 3 M. & W. 220; 7 L. J. N. S. Exch. 101.

^e 12 Q. B. 739; 20 L. J. Q. B. 10.

Campbell, C. J., in his judgment, remarked: "Although there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favors the preservation of enjoyments acquired by the labor of one man and acquiesced in by another who has the power to interrupt them; and as on the supposition of a grant the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle." This passage is noticed in the subsequent case of *Solomon v. The Vintners' Company*,^f and the nature of the right to support for building was there again considered. The question in that action related to a right of support for one building from another, but Pollock, C. B., in his judgment, remarked that it seemed to the court that, in the absence of all evidence as to origin or grant, the only way in which such a right could be supported was that suggested by Lord Campbell in *Humphries v. Brogden*, namely, an absolute rule of law similar to that which is stated to have existed in the civil law.

THE AMERICAN RULE.

Notwithstanding the numerous English authorities supposed to sanction the doctrine of a prescriptive right for the support of buildings, cited by Mr. Goddard, it may be more than doubted whether such a proposition will be established on this side of the Atlantic. The reasons against it are the same as those against a prescriptive right to light and air, which, with the authorities on the subject, are given in the preceding part of this work.¹

It is true many dicta may be found in the American reports, sustaining such a doctrine, and Judge Washburn, in his

^f 4 H. & N. 585; 28 L. J. Exch. 370.

¹ *Ante*, p. 202.

excellent treatise on Easements,¹ assumes it as settled law, and perhaps it has been generally so understood in the profession; but if, as all agree, prescription rests for its basis upon an implied acquiescence of the adverse party; if, as none deny, no acquiescence can be implied in an act which such adverse party has no legal right or remedy to prevent; and if, as is clear, one landowner has no legal power to prevent another from erecting and maintaining a building on his own land, even *ad cælum*, it is difficult, if not impossible, to understand how the continuance of such a building for twenty, or even a hundred years, can raise a presumption of assent in one who had no power or right to dissent. He cannot tear down the house, he cannot bring an action for its erection; he cannot even dig down on his own land and let it fall before it has acquired any supposed right from age, for that would cause the land under such house to fall also, and for *that injury* he would be immediately liable to an action, the damages being confined to the injury to the land and not to the building. He is, therefore, powerless; and yet it has been supposed that, with his arms bound and his hands tied, he is legally assenting to an act from which he has no power to dissent.

The soundness of any such doctrine was more than doubted by the learned chief justice of Massachusetts, in the recent case of *Gilmore v. Driscoll*,² although the point was not necessarily involved, since the structures in that case had not been standing twenty years; but the question directly arose in Georgia, in 1873, and the existence of any such principle was emphatically denied.³

¹ Ch. IV. sec. 1.

² 122 Mass. at p. 207 (1877). And see an able article in 1 Am. Law Rev. p. 10, by F. V. Balch, Esq., of the Boston bar.

³ *Mitchell v. Mayor*, 49 Ga. 19. After adverting to the rule, that to authorize prescription there must be adverse enjoyment, and that the rule is well applied to such positive easements as ways and watercourses, Trippe, J., says: "But it is difficult, if not impossible, to see how this doctrine can be made to apply to those instances of easements, so called, where there is no possession of anything belonging to another, no encroachment upon another's rights, no adverse user, — in fact, nothing done whatever against which another could complain, or for which an action could be brought, and no remedy existing whereby to prevent such a pre-

There is also reason to believe the true doctrine will yet prevail in England. It was recently much discussed in the Queen's Bench in *Angus v. Dalton*.¹ It was an action by the owner of a factory against the defendant for excavating the soil of an adjoining lot in such a manner as to leave the foundation of part of the factory without sufficient lateral support, and thereby causing it to fall. It appeared that the two buildings had apparently been erected at the same time, and were estimated to be upwards of one hundred years old. Both had been occupied as dwelling-houses until about twenty-seven years before the accident, but the plaintiff's predecessor had then converted his house into a coach factory, removing the internal walls, and erecting a stack of brickwork, which served as a chimney stack, and also supported the girders which he put up to sustain the floors. The defendant, in taking down the adjoining house, and in digging cellars which had not previously existed, left a support for the chimney stack which proved insufficient, and it fell, drawing after it the entire factory. On the question whether the defendant was liable the judges disagreed. Lush, J., thought that plaintiff had acquired a prescriptive right to the support of his factory, while Cockburn, C. J., and Mellor, J., held otherwise. The principal judgment was prepared by Cockburn, C. J., who traced the growth of this doctrine, as to presumption and the extent to which it has been carried, and reviewed fully the authorities on the law of prescriptive easements.

The learned chief justice first showed at length that the whole theory of prescription depends upon the presumption of a grant having been made, and that if, therefore, it can be shown that no grant could have been legally made, or that it was an improbable thing that a grant ever was made, the presumption cannot arise and the title by prescription fails, or, in other words, that the twenty years' enjoyment of the support was not conclusive, but only evidence of a presumption. But the most significant portion of the judgment is the following :

sumption from arising." Similar language was used forty years ago in *Richart v. Scott*, 7 Watts, 460.

¹ 3 Q. B. D. 85 (1877).

“I am very far from saying that, when houses or buildings have stood for many years, especially when they appear to be of equal age, the presumption of a reciprocal easement of lateral support ought not to be made. It may reasonably be inferred that they were built under any of the circumstances from which, at the present time, a grant would properly be implied. Thus they may have been built by one owner, or under a common building lease, or if built by different owners, where some arrangement for mutual support was come to. Thus, had the plaintiff's premises remained in their original condition, I should have been prepared to make the necessary presumption to uphold the right. Where land has been sold by the owner for the express purpose of being built upon, or where, from other circumstances, a grant can reasonably be implied, I agree that every presumption should be made, and every inference should be drawn in favor of such an easement, short of presuming a grant when it is undoubted that none has ever existed. But in the absence of any such circumstances, there is no form of easement in which, as it seems to me, the doctrine of presumption should be more cautiously and sparingly applied than the easement of lateral support. For this easement is obviously one of a very anomalous character. In every other form of easement the party whose right as owner is prejudicially affected by the user, has the means of resisting it if illegally exercised. In the case of the so-called ‘affirmative’ easements, he can bring his action or oppose physical obstruction to the exercise of the asserted right. Even in the case of another negative easement, and which is said to approach the more nearly to this — that of light — the supposed analogy entirely fails. For although no action can be brought against a neighboring owner for opening windows overlooking the land of another, there is still the remedy, however rude, of physical obstruction by building opposite to them. But against the acquisition of such an easement as the one here in question, the adjoining owner has no remedy or means of resistance, — unless, indeed, he should excavate in his own immediately adjacent soil while the neighboring house is being built, or before the easement has been

fully acquired, for the purpose of causing the house to fall. But what would be thought of a man who thus asserted his right? Or, possibly, as in the present instance, he may have built to the extremity of his own land, and may require the support of his soil to uphold his own house; is he to endanger and perhaps destroy his own house by excavating under it for the purpose of preventing his neighbor from acquiring the right of support? The question, as it seems to me, answers itself. To say that by reason of an adjoining house being built on the extremity of the owner's soil a right of support is to be acquired in the absence of any grant or assent, express or implied, against the adjacent owner, who may be altogether ignorant whether the house or other building is supported by his soil or not, and who, whether he knows it or not, has no means of resisting the acquisition of an easement against himself, either by dissent or resistance of any kind, appears to me to be repugnant to reason and common sense, as well as to the first principles of justice and right."

The decision, therefore, was against any prescriptive right; but considering the elaborate dissenting opinion of Lush, J., and the hesitating assent of Mellor, J., in the opinion of the chief justice, and considering that the doctrine has yet the express approbation of only two of the fifteen common law judges of England, it can hardly be said to be the established law of England. And on appeal¹ the decision below was not fully approved, and these conclusions were reached. The right to the support of a building by the adjacent soil of an adjacent owner is not a natural right of property; it is an easement which may be acquired by prescription from the time of legal memory, or by grant express or implied; but it is not an easement within the Prescription Act (2 & 3 Wm. IV. c. 71). It may also be acquired by the circumstance that the building has stood for twenty years, if during that period the owner of the adjacent soil knew or might have known that the building was thereby supported, and if he was capable of making a grant; and (by Cotton and Thesiger, L. JJ.,

¹ 4 Q. B. D. 162. But the general principles stated by Cockburn, C. J., in the court below, were not impugned.

as to this Brett, L. J., dissenting) after twenty years' enjoyment in point of fact of the support to the building the claim to it as a matter of right will not be defeated by proof that no grant of the easement was ever made. But upon the facts of this particular case, it was held by Cotton and Thesiger, L. JJ., overruling the judgment of the majority of the Queen's Bench Division (Brett, L. J., dissenting, in an able opinion), that the defendants were not entitled to judgment, for the enjoyment during more than twenty years of the support in point of fact raised a presumption that the occupiers of the plaintiff's factory were entitled thereto as matter of right, and the circumstance that no grant of the easement of support had been made was not material; but that the defendants were entitled to a new trial on the ground that they might rebut the presumption by evidence, either that the owner of the house pulled down by the defendants did not know the nature of the alterations made when the building occupied by the plaintiffs was converted into a factory, or that he was incapable of making a grant. By Brett, L. J., that as it had been admitted that no grant by deed of the right of support for the factory had ever been made, no easement had been acquired from the enjoyment in fact for twenty years of the support of the adjacent soil, and that the defendants were entitled to judgment.

By whatever means a prescriptive right to support for buildings from *land* arises, whether by presumed grant or by an absolute rule of law, there is no doubt that no right to support for one building from another can be acquired by prescription, either at common law or under the Prescription Act, because the support which one building receives from another must be enjoyed, if at all, by stealth; and enjoyment by stealth, it has been explained, is insufficient to confer a right by prescription: no one can tell till a house is pulled down whether it has afforded support to an adjoining building at all, and if it is then found to do so, no one knows when the support was first afforded. *Solomon v. The Vintners' Company*^o was an

^o 4 H. & N. 585; 28 L. J. Exch. 370. See *Brown v. Windsor*, 1 Crompt. & J. 20.

action for removing support afforded by one house to another, whereby the latter fell ; the houses, however, were not adjoining, but were separated from each other by another house, which also tumbled down when the support was removed. Two judgments were given in the case—one by Pollock, C. B., and the other by Bramwell, B. In speaking of the general right to support for buildings from buildings, Pollock, C. B., assigned a different reason from that given by the other learned judge, why, in his opinion, no right to support could be acquired by prescription, but both appeared to think such a right could not be so acquired. The Lord Chief Baron said : “ It is extremely difficult to see how the circumstance of the houses having stood for twenty years makes any difference or creates a right where houses are supposed to have been built by different adjoining landowners, each with its separate and independent walls, but that upwards of twenty years ago one of them got out of the perpendicular and leaned upon and was supported in part by the other, so that if the latter were removed the other would fall. The question is, whether any right of support is thereby obtained. It cannot be a right by prescription, which supposes a state of things existing before the time of legal memory. Nor does it seem to us to be a right under the Prescription Act, 2 & 3 Wm. IV. c. 71, which has been hitherto confined to rights in their nature of a perpetual and permanent character, and the ownership of which is a fee simple.” Baron Bramwell put the case on another ground, namely, that the right could not be acquired by prescription, because the enjoyment was not of a character which would confer such a right. He said that supposing the right were capable of being acquired by prescription, or under the Prescription Act, or by some supposed lost grant, it could in any of those cases only exist if the benefit which is claimed was one that was enjoyed as of right. “ Now, a thing cannot be enjoyed as of right unless it is openly and visibly enjoyed. An enjoyment must neither be *vi*, *precario*, nor *clam* ; it must be open. Now, when you see one house leaning towards another, you may make a tolerably shrewd guess that it is partly supported by the other ; but it is but a guess ; you

cannot tell. It may be that they have both slipped, and both stand, as I think the expression is, upon 'the square' — self-supporting — and it may turn out, and it may be the fact, that the house which leans towards the other affords as much support to that other, by the two being joined or sticking together in some way or another, as the other affords to it. One cannot tell upon the face of it that it is being supported," "therefore, to my mind, supposing the plaintiff for more than twenty years had an enjoyment, which he says now ought to continue, it was an enjoyment *clam* — not openly, and consequently not as a right."

It may be taken from these judgments that no right to support for one building from another can be acquired by prescription, either for the reason assigned by the Lord Chief Baron Pollock, or that in the judgment of Mr. Baron Bramwell; but when the reasons there assigned are considered, it seems very strange that they should not apply with equal force to cases of support for buildings from adjacent land, so as to prohibit the acquisition of rights to lateral support for buildings by prescription altogether, for it may in such case equally well be said that the right could not be acquired at common law which supposes a state of things which has existed from before the time of legal memory, not under the statute, because the act applies only to rights of a perpetual and permanent nature; there can be but little doubt, also, that the enjoyment of lateral support from land is as stealthy in its character as support from an adjoining building, for who can tell that any support is afforded by adjacent ground, and if it is, whether that support was first afforded when the house was built, or subsequently when the house increased in age, and the subjacent soil became compressed by its weight. It can be but a matter of speculation. Independently of these reasons, the nature of the easement is such that the servient owner can have no power of resisting the enjoyment, and how, then, can a grant be presumed? For all these reasons it would surely be far more reasonable if some absolute rule of law were established, and that the theory of presuming a grant were entirely abandoned.

WATER.

And here again the reader is reminded that this section is intended to treat of "Easements in Water," and not of "Watercourses" generally. Every riparian proprietor has a "natural right" that a natural stream of water flowing through his premises shall enter where it naturally did, and in its natural quantity and purity, and that it leave his land free and unobstructed by the proprietor below. But the proprietor above may claim a right to interfere with this natural condition of the stream, and either to change its channel, or its quantity, or its purity; and if he does this under an assumed natural right, the limits and extent of such a right properly belongs to a treatise on watercourses. But if he asserts that such right has been acquired by grant or prescription, then he claims an easement in the water. So every riparian proprietor, or mill-owner, has a natural right, irrespective of any grant or prescription, to use the stream in a reasonable manner, for the purposes of his lawful business, although the water is thereby *somewhat* contaminated, as by the deposit of sawdust, tan-bark, &c;¹ and it is only when he attempts to do so in some unreasonable manner, either as to quantity or time, that he need rely upon any acquired right or easement, by grant or prescription, and then he is subject to the ordinary rules of acquiring easements.² So every riparian proprietor has a right to have the water flow *from* his land without obstruction; and he may enter on the premises below and remove any unlawful obstruction caused by the owner below; but this is a natural, and not an acquired right, although it is sometimes called a "natural easement,"³ or secondary ease-

¹ See *Snow v. Parsons*, 28 Vt. 459; *Jacobs v. Allard*, 42 Vt. 303; *Veazie v. Dwinel*, 50 Me. 490; *O'Reiley v. McChesney*, 49 N. Y. 672; *Prentice v. Geiger*, 74 N. Y. 341.

² See *Jones v. Crow*, 32 Penn. St. 398; *Hayes v. Waldron*, 44 N. H. 585; *Murgatroyd v. Robinson*, 7 El. & Bl. 391; *Moore v. Webb*, 1 C. B. N. S. 673; *Housee v. Hammond*, 39 Barb. 89; *Holsman v. Boiling Spring Co.* 1 McCarter, 335.

³ See *Prescott v. Williams*, 5 Met. 435; *Prescott v. White*, 21 Pick. 342; *Hodges v. Raymond*, 9 Mass. 316; *Heath v. Williams*, 25 Me. 209; *Cary v. Daniels*, 5 Met. 236; *Ashley v. Ashley*, 6 Cush. 70.

ment. If, however, the proprietor claims a right to pen back the water on the land above him, this, if it exists at all, is an acquired right or easement, and all such cases properly come under consideration in a treatise on Easements.

So, also, the right of the public to pass and repass up and down navigable streams or large rivers, — great natural highways, — being also a natural right, is not discussed here.

The distinction between natural or riparian rights and easements in watercourses has been explained in the previous chapter, and it was at the same time shown that easements in water are of three kinds, namely, those which relate to the flow of water, those which relate to purity of water, and those which relate to the taking of water for use. These easements may be acquired by grant, express or implied, or by prescription.

Questions as to grants of water rights, or easements in water, generally arise when the property in lands owned by one and the same person has been severed by sale, and when water in one part has been used during the unity of ownership for the benefit of the other part, after the manner of an easement. In such cases, if the owner sells the *quasi*-dominant part of his lands, with the “appurtenances,” or with the easements therewith “used and enjoyed,” questions frequently arise whether the purchaser has become entitled by virtue of the grant to use the water in the vendor’s land as the latter used it when he held both properties. The rules of law on this topic have already been considered when the subject of acquisition of easements generally by grant was discussed in the first section of this chapter.

Rights to watercourses and the use of water are two of the classes of easements expressly mentioned in the second section of the Prescription Act as being capable of acquisition under that statute; but the effect of that act, as was previously shown, is not to preclude easements of this kind from being acquired by prescription at common law.^a Those rights may therefore be claimed and acquired by prescription either at common law or under the act. The

^a *Holford v. Hankinson*, 5 Q. B. 584.

power of acquiring easements in water by prescription, however, extends only to streams which flow in defined courses, and to pools of a permanent character: no rights in the nature of easements can be acquired in mere surface water which oozes through the soil and trickles away without any defined course, and the owner of land may get rid of the nuisance from such water in any way that is most convenient to himself.¹

Streams and pools must be defined and permanent.

IN AMERICA,

it is sometimes held that every landowner has a natural right to detain, divert, or obstruct the passage of mere *surface* water over his land, at his own pleasure, and without any liability to his neighbor.¹ And where this is so held he has no need of acquiring such right as an easement.

And by "surface water" is meant not only that which comes from falling rains, or melting snows, but also that which oozes from the ground and finds its way over the surface, through the grass or among the tussocks, but not gathered into a defined channel or stream, with a bed and banks. And the passage of such water from one's own land over the surface of a neighbor's land for more than twenty years can give no prescriptive right to its continuance so to flow.²

On the other hand, there is no natural right to collect even surface water into an *artificial channel*, and thus turn it upon

¹ *Rawstron v. Taylor*, 11 Exch. 369; 25 L. J. Exch. 33; *Broadbent v. Ramsbotham*, 11 Exch. 603; 25 L. J. Exch. 115.

² *Morrill v. Hurley*, 120 Mass. 99; *Gannon v. Hargadon*, 10 Allen, 110; *Franklin v. Fisk*, 13 Allen, 211; *Taylor v. Fickas* 64 Ind. 168, a late and valuable case on the subject; *Bentz v. Armstrong*, 8 Watts & Serg. 40; *Bates v. Smith*, 100 Mass. 182; *Goodale v. Tuttle*, 29 N. Y. 467; *Conhoughton Railroad Co. v. Buffalo, &c. Railroad Co.* 5 T. & C. 651; 3 Hun, 523; *Frazier v. Brown*, 12 Ohio St. 300; *Wagner v. Long Island Railroad Co.* 5 T. & C. 163; 2 Hun, 633; *Swett v. Cutts*, 50 N. H. 439; *Waffle v. New York Central Railroad Co.* 58 Barb. 413; *Bowlsby v. Speer*, 31 N. J. Law, 352; *Buffum v. Harris*, 5 R. I. 243; *Hoyt v. Hudson*, 27 Wis. 656; *M'Gillivray v. Millin*, 27 Up. Can. Q. B. 62; *Crewson v. Grand Trunk Railway Co.* Ib. 68; *Nichol v. Canada Southern Railway Co.* 40 Ib. 593; *Darby v. Corporation of Crowland*, 38 Ib. 338; *Lynch v. The Mayor*, 76 N. Y. 60.

² *Parks v. Newburyport*, 10 Gray, 28.

or over a neighbor's land;¹ but such right might be acquired as an easement. But as many states deny the existence of any natural right so to dispose of even mere surface water,² the right could never exist in such states, except as an acquired right or easement.

An intermediate view sometimes obtains, viz., not that every landowner always has an absolute and unqualified right to obstruct surface water and set it back upon the land of his neighbors; nor, on the other hand, that he is always and under all circumstances liable if he does so; but that his liability in such cases depends upon the question whether such obstruction and penning back was reasonable under the circumstances of each particular case, which would ordinarily be a question for the jury, under the instructions of the court.³

When streams of water have assumed a defined and permanent course, natural rights are given by law to owners of riparian land if the defined streams are formed by natural means; if, on the other hand, water is artificially conducted in a defined course, rights to the uninterrupted flow of that water, and to use the water uninterruptedly as it passes land, may in certain cases be acquired by prescription.⁴ In this respect, however, the person

Prescriptive rights in artificial streams.

¹ See *Dickinson v. Worcester*, 7 Allen, 19; *Butler v. Peck*, 16 Ohio St. 334; *Pettigrew v. Evansville*, 25 Wis. 223; *Miller v. Laubach*, 47 Penn. St. 155; *Laney v. Jasper*, 39 Ill. 46; *Livingston v. McDonald*, 21 Iowa, 160; *Nevins v. Peoria*, 41 Ill. 502; *Byrnes v. City of Cohoes*, 67 N. Y. 204; *Bastable v. City of Syracuse*; 8 Hun, 587; *City of Aurora v. Gillett*, 56 Ill. 132; *City of Jacksonville v. Lambert*, 62 Ill. 519.

² See *Ogburn v. Connor*, 46 Cal. 346, a valuable case on the point; *Gillham v. Madison Railroad Co.* 49 Ill. 484; *Gormley v. Sanford*, 52 Ill. 158; *Laumier v. Francis*, 23 Mo. 181; *Porter v. Durham*, 74 N. C. 767; *Bowman v. New Orleans*, 27 La. An. 501; *Beard v. Murphy*, 37 Vt. 104; *Lattimore v. Davis*, 14 La. 161; *Hays v. Hays*, 19 La. 351; *Kauffman v. Griesemer*, 26 Penn. St. 407; *Bellows v. Sackett*, 15 Barb. 96; *Martin v. Riddle*, 26 Penn. St. 415; *Adams v. Walker*, 34 Conn. 466.

³ *Sweet v. Cutts*, 50 N. H. 439, a very well considered case.

⁴ The law respecting rights, and the modes of acquiring rights to the uninterrupted flow of streams, is the same, whether the streams are above or under ground, if the course is defined and known. *Chasemore v. Richards*, 7 H. L. C. 349; 29 L. J. Exch. 81; *Wood v. Waud*, 3 Exch. 748; 18 L. J. Exch. 305; *Dickenson v. Grand Junction Canal Co.* 7 Exch. 282; 21 L. J. Exch. 241.

who *creates* an artificial stream stands in a different position from one through whose land the water flows when the stream is created; for easements may, in some cases, be acquired against the latter, when they cannot be acquired against the former. The possibility of acquiring rights to the uninterrupted flow of the water of artificial streams against their originator depends upon the circumstance whether the streams are of a temporary or of a permanent character.

Whether the character of a stream is temporary or permanent is, of course, a question of fact in each case; there are many instances in which this case may present some difficulty, but there are others in which no doubt can arise. If, for instance, a stream originates from the pumping of water from a mine, there can be no doubt that the character of that stream is temporary, although it may happen that the pumping will continue for a hundred years; and, on the other hand, a watercourse dug to supply a mill with water taken from a river will probably be held to be of a permanent character, although it is possible that the mill will be removed and the watercourse filled up in a short time. The character of a stream therefore, whether permanent or temporary, cannot be determined solely by the length of time during which the supply of water is likely to continue, but it is rather to be decided by the apparent intention of the person who created the stream, and the mode by which the supply of water is procured.^k

It is not absolutely necessary that the flow of water should be constant all the year round, in order to constitute it a watercourse. If, when it does flow, it naturally forms a bed, banks, and well defined channel, it is then a watercourse, although at some seasons of the year it may be wholly dry; but it must have these elements; viz., a well defined and substantial existence.^l

^k *Beeston v. Weate*, 5 E. & B. 986; 25 L. J. Q. B. 115.

^l *Ashley v. Wolcott*, 11 Cush. 195; *Shields v. Arndt*, 3 Green Ch. R. 246; *Wagner v. Long Island Railroad Co.* 5 T. & C. 163; 2 Hun, 633; *Luther v. Winnisimmet Co.* 9 Cush. 171; *Eulrich v. Richter*, 41 Wis. 318; *Barnes v. Sabron*, 10 Nev. 217.

If an artificial stream of water is of a temporary character, no right that the supply of water shall be uninterrupted can be acquired by prescription against the originator of the stream, though such a right may be so acquired against persons through whose land the water has been accustomed to flow. The celebrated case of *Arkwright v. Gell*¹ is the leading authority on the law relating to water rights in artificial streams, and the facts of that case were shortly these. The plaintiffs were owners of some cotton mills, and the action was brought in consequence of certain alleged wrongful diversion of the water of a stream which was accustomed to supply the mills, to the uninterrupted use of which the plaintiffs claimed to be entitled. The stream in question was a mineral sough, which had existed for many years, though the precise origin of its existence, and the date when it was made, were unknown; but a part towards the mouth had existed upwards of one hundred and thirty years, and was made, and had always to the time of the action been used, for the purpose of draining lead mines. The plaintiffs' mills were erected in the year 1772, nearly sixty years before the action, and the water of the sough had ever since been used to turn the wheels and machinery of the mills, and it was under these circumstances that the plaintiffs claimed to be entitled by prescription to the continued use of the water. The law was so fully considered in the judgment, and the case has always been received as an authority of such weight, that it may not be out of place to cite the material part of the judgment at length. After reciting the facts, Parke, B., who delivered the judgment of the court, said: "The stream upon which the mills were constructed was not a natural watercourse, to the advantage of which flowing in its natural course the possessor of the land adjoining would be entitled according to the doctrine laid down in *Mason v. Hill*, and in other cases. This was an *artificial* watercourse, and the sole object for which it was made

¹ 5 M. & W. 203; 8 L. J. N. S. Exch. 201; *Gaved v. Martyn*, 19 C. B. N. S. 732; 34 L. J. C. P. 353; *Greatrex v. Hayward*, 8 Exch. 291; 22 L. J. Exch. 137. See *Curtiss v. Ayrault*, 47 N. Y. 82.

was to get rid of a nuisance to the mines, and to enable their proprietors to get the ores which lay within the mineral field drained by it; and the flow of water through that channel was, from the very nature of the case, of a temporary character, having its continuance only whilst the convenience of the mine-owners required it, and in the ordinary course it would most probably cease when the mineral ore above its level should have been exhausted. That Sir Richard Arkwright contemplated the discontinuance of this watercourse (if the question of his knowledge in this state of things can be material), there is evidence in the lease made in 1771, which contains a provision for a supply from the river, in the event of the stream being lessened or taken away, by the construction of another sough; and also that such an event was not improbable appears from the clause in the second Cromford Canal Act, 30 Geo. III. c. 56, s. 4. What, then, is the species of right or interest which the proprietor of the surface where the stream issued forth, or his grantees, would have in such a watercourse at common law, and independently of the effect of user under the recent statute, 2 & 3 Wm. IV. c. 71? He would only have a right to use it for any purpose to which it was applicable so long as it continued there. A user for twenty years, or a longer time, would afford no presumption of a grant of the right to the water in perpetuity; for such a grant would in truth be neither more nor less than an obligation on the mine-owner not to work his mines by the ordinary mode of getting minerals below the level drained by that sough, and to keep these mines flooded up to that level in order to make the flow of water constant for the benefit of those who had used it for some profitable purpose. How can it be supposed that the mine-owners could have meant to burden themselves with such a servitude so destructive to their interests; and what is there to raise an inference of such an intention? The mine-owner could not bring any action against the person using the stream of water, so that the omission to bring any action could afford no argument in favor of the presumption of a grant; nor could he prevent the enjoyment of that stream of water by any act of his, except

by at once making a sough at a lower level, and thus taking away the water entirely, a course so expensive and inconvenient that it would be very unreasonable and a very improper extension of the principle applied to the case of lights, to infer from the abstinence from such an act an intention to grant the use of the water in perpetuity as a matter of right. Several instances were put, in the course of the argument, of cases analogous to the present, in which it could not be contended for a moment that any right was acquired. A steam-engine is used by the owner of a mine to drain it, and the water pumped up flows in a channel to the estate of the adjoining landowner, and is there used for agricultural purposes for twenty years. Is it possible, from the fact of such a user, to presume a grant by the owner of the steam-engine of the right to the water in perpetuity, so as to burden himself and the assigns of his mine with the obligation to keep a steam-engine forever for the benefit of the landowner? Or if the water from the spout of the eaves of a row of houses was to flow into an adjoining yard, and be there used twenty years by its occupiers for domestic purposes, could it be successfully contended that the owners of the houses had contracted an obligation not to alter their construction so as to impair the flow of water? Clearly not. In all, the nature of the case distinctly shows that no right is acquired as against the owner of the property from which the course of water takes its origin; though as between the first and any subsequent appropriator of the watercourse itself such a right may be acquired. And so in the present case Sir Richard Arkwright, by the grant from the owner of the surface for eighty-four years, acquired a right to use the stream as against him, and if there had been no grant he would by twenty years' user have acquired the like right as against such owner; but the user, even for a much longer period, whilst the flow of water was going on for the convenience of the mines, would afford no presumption of a grant at common law as against the owners of the mines."

If an artificial stream of water is permanent in its character, a right to the uninterrupted flow of the water may be

acquired against both the originator of the stream and also against any person over whose land the water flows. From the judgment in *Arkwright v. Gell*, above quoted, it will be seen that the reason why a right to the uninterrupted flow of the water of an artificial stream cannot be acquired by prescription against the originator of the stream, if it is of a temporary character, is, that the temporary nature of the stream precludes a presumption of a grant of a permanent right; but the case is manifestly different if the stream is permanent, although artificial, for there can be no reason why a person who makes a permanent watercourse may not make a grant of right in perpetuity to use the water to any person through whose land the stream is made to flow, and, indeed, nothing is more likely than that an owner of land would stipulate, when such a watercourse is made, that he shall have the benefit and use of the water as it flows through his land. A presumption of such a grant, therefore, may readily be made, and it will receive the sanction of the law. In the case of *Wood v. Waud*,^m the judgment of the Court of Exchequer in *Arkwright v. Gell* was considered and approved, and the court further said, that the right to artificial watercourses, as against the party creating them, must depend upon their character, whether they are of a permanent or temporary nature, and upon the circumstances under which they were created—that the enjoyment for twenty years of a stream, diverted or penned up by permanent embankments, clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or cultivation of a person's property, and presumably of a temporary character, and liable to variation.

Underground streams are of two kinds, namely: those, the course of which is defined and known, and those which merely percolate through the earth, without having any defined course, and in unknown channels. If the course of underground streams is defined and known, they differ in no respect from surface streams as to the natural rights and easements to which landowners may be

Prescriptive rights in permanent artificial streams.

Right to flow of underground streams.

^m 3 Exch. 748; 18 L. J. Exch. 305.

entitled in them,ⁿ but if water merely percolates through the soil in unknown channels, the same rules of law do not apply, and streams so formed differ altogether from defined streams on the surface of land. And this distinction between underground *streams*, and water merely percolating or soaking through the soil in invisible and unknown channels is also well established in the American law.¹ Rights to the uninterrupted flow of percolating streams, the course of which is undefined and unknown, may be granted by one landowner to another,^o but no such rights can be acquired by prescription. That there is no natural right to the uninterrupted flow of such streams was decided in the case of *Acton v. Blundell*,^p but the Court of Exchequer Chamber in that case expressly guarded itself from saying what might be the rule of law if there had been an uninterrupted enjoyment of such streams for twenty years. In the subsequent case of *Chasemore v. Richards*,^q the theory that a right to the uninterrupted flow of such streams can be acquired by prescription, was shown to be contrary to the ordinary principles of law, for White-man, J., while delivering the opinion of the judges to the House of Lords, said, that any such right against another person, founded upon length of enjoyment, is supposed to have originated in some grant, but what grant could be presumed in the case of percolating waters depending upon the quantity of rain falling, or the natural moisture of the soil, and in the absence of knowing to what extent, if at all, the enjoyment would be affected by any water percolating from one piece of

ⁿ *Chasemore v. Richards*, 7 H. L. C. 349; 29 L. J. Exch. 81; *Wood v. Waud*, 3 Exch. 748; 18 L. J. Exch. 305; *Dickinson v. Grand Junction Canal Co.* 7 Exch. 282; 21 L. J. Exch. 241.

¹ See *Whetstone v. Bowser*, 29 Penn. St. 59; *Cole Silver Mining Co. v. Virginia and Gold Hill Water Co.* 1 Sawyer, 470; *Chatfield v. Wilson*, 29 Vt. 49; *Bassett v. Salisbury Man. Co.* 43 N. H. 569; *Goodale v. Tuttle*, 29 N. Y. 466; *Frazier v. Brown*, 12 Ohio St. 304; *Haldeman v. Bruckhardt*, 45 Penn. St. 521; *Trustees of Delhi, &c. v. Youmans*, 50 Barb. 316; 45 N. Y. 362; and cases cited, *post*, p. 253, note.

^o *Whitehead v. Parks*, 2 H. & N. 870; 27 L. J. Exch. 169.

^p 12 M. & W. 324; 13 L. J. Exch. 289.

^q 7 H. L. C. 349; 29 L. J. Exch. 81.

land to another? He added also, that the presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant; but how could a man prevent or stop the percolation of water? Lord Wensleydale also stated that he did not think that the principle of prescription could be applied to the case.

A right to divert the water of a stream from its usual course is an easement which may be acquired by grant or prescription, and this easement may be ac- Diversion
of streams.quired both in natural and in artificial streams.¹ That the water of natural streams shall flow on uninterruptedly and without diversion is one of the natural rights to which all owners of land abutting on such streams are entitled; but if another person, riparian owner or otherwise, has uninterruptedly diverted the water, whether continuously or at intervals — as, for instance, at particular times of the year — for twenty years, an adverse easement entitling him to continue such diversion may be acquired against the riparian owners by prescription.² Similarly a right may be acquired to divert the water of artificial streams; but it would seem from the principle laid down in the case of *Arkwright v. Gell*, above cited, that if an artificial cut in which water flows has been made merely for a temporary purpose, no prescriptive right to divert the water can be acquired against the maker of the cut.³

In like manner a right may be acquired to obstruct the water of a stream from flowing in its usual course, and to pen it back on to the land of riparian propri- Right to
pen back
the water
of streams.etors, if the practice of obstructing and penning it

¹ That one may acquire a right by prescription to divert the water as it flows through his own land, and use it for his own purposes, see *Norton v. Volentine*, 14 Vt. 239; *Bolivar Man. Co. v. Neponset Man. Co.* 16 Pick. 241; *Belknap v. Trimble*, 3 Paige, 577; *Ingraham v. Hutchinson*, 2 Conn. 584; *Jones v. Crow*, 32 Penn. St. 398; *Brace v. Yale*, 10 Allen, 441; 97 Mass. 18; *Buddington v. Bradley*, 10 Conn. 213; *The American Co. v. Bradford*, 27 Cal. 360.

² *Wright v. Howard*, 1 Sim. & St. 190; 1 L. J. Ch. 94; *Bealey v. Shaw*, 6 East, 209; *Mason v. Hill*, 3 B. & Ad. 304; 1 L. J. N. S. K. B. 107; *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300.

³ *Beeston v. Weate*, 5 E. & B. 986; 25 L. J. Q. B. 115.

back has continued for twenty years uninterruptedly, and if the servient owner has been prejudiced thereby.¹ No right, however, to obstruct the water of a navigable stream can be acquired against the public ;² although if the public did not complain, a person might by prescription acquire a right, as against a private owner alone, to flow back a navigable stream as well as any other.²

A right may also be acquired by grant or by prescription to pour water over the land of another person, for if a stream is artificially brought to the surface of land, and the water is then made to flow over the land of another person without his consent, a trespass is committed for which the party causing the water to flow is responsible ; but if the practice of so pouring the water over the land has continued uninterruptedly for twenty years, such user will cause a presumption of grant to arise, and a right to continue the pouring of water may be acquired. Although a right to pour water over land may thus be acquired by prescription,

Pouring
water over
land.

¹ *Cooper v. Barber*, 3 Taunt. 99.

² That a right to overflow the lands above may in America also be acquired by prescription, see *Sherwood v. Burr*, 4 Day, 244; *Williams v. Nelson*, 23 Pick. 141; *Baldwin v. Calkins*, 10 Wend. 169; *Stiles v. Hooker*, 7 Cow. 266; *Townsend v. McDonald*, 14 Barb. 467; *Cowell v. Thayer*, 5 Met. 253; *Middleton v. Gregorie*, 2 Rich. 631; *Hurlbut v. Leonard*, *Brayt.* 201. Of course a right to flow back upon another's land cannot be acquired by prescription, unless the enjoyment was *adverse* to the land-owner. *Colvin v. Burnet*, 17 Wend. 564; *Hart v. Vose*, 19 Wend. 365; *Campbell v. Smiths*, 3 Halst. 140; *Vliet v. Sherwood*, 35 Wis. 229. And if, during the twenty years or other necessary prescriptive period, the dam is raised *higher*, so as to overflow more land, the prescriptive right extends only to the lower level, and an action lies for the excess. *Stiles v. Hooker*, 7 Cow. 266; *Sherwood v. Burr*, 4 Day, 244; *Baldwin v. Calkins*, 10 Wend. 175; *McNab v. Adamson*, 6 Up. Can. Q. B. 100. It is not fully agreed whether, if the water be raised higher by merely repairing the dam, that interrupts the prescriptive right. See *Cowell v. Thayer*, 5 Met. 253, for an elaborate examination of this point. But this subject will be more fully considered in the next chapter.

³ *Vooght v. Winch*, 2 B. & Ald. 662.

⁴ *Borden v. Vincent*, 24 Pick. 301; *Stiles v. Hooker*, 7 Cow. 266; *Perley v. Hilton*, 55 N. H. 445. And see *Lawrence v. Fairhaven*, 5 Gray, 114.

the practice of pouring the water will not alone be evidence that the land from which the water is sent has become subject to the servitude of *supplying* water, and that the owner of such land is bound to continue to send water to his neighbor's ground; other and additional circumstances, however, may exist, which will have the effect of establishing such an obligation on the originator of the stream — as, for instance, that the stream was originally intended to be permanent, or if the supply of water is continuous, that the originator had permanently abandoned mining works from which the stream arose and from which it continued to flow.^v

An easement may be acquired in the land of another for drip of eaves upon his land; and this may also be by prescription or grant.¹

Drip of
eaves.

That all riparian owners of natural streams have a riparian right to use the water as it flows past their land, so long as they do not interfere with the natural rights of other riparian owners, and to sue for disturbance, is now an established doctrine of law, but this doctrine was not established until comparatively modern times; and in the earlier decisions of the courts a theory of a very different kind was advanced, by which rights were supposed to be acquired by the appropriation of water, similar to those rights which have since been held to belong to all riparian proprietors of streams *ex jure naturæ*. The earliest doctrine on this subject appears to have been, that flowing water was the property of no one, and that nobody had any particular right to use it until somebody actually took possession and applied it to a purpose of utility—that by so doing he acquired a right to continue the use of it against all the world, and that his right continued until he

Effects of
appropriation
of
flowing
water for
particular
purposes.

^v *Gaved v. Martyn*, 19 C. B. N. S. 732; 34 L. J. C. P. 353; *Wright v. Williams*, 1 M. & W. 77; 5 L. J. N. S. Exch. 107; *Arkwright v. Gell*, 5 M. & W. 203; 8 L. J. N. S. Exch. 201; *Mason v. Shrewsbury and Hereford Railway Co. per Cockburn*, C. J., L. R. 6 Q. B. at p. 588; 40 L. J. Q. B. at p. 298.

¹ See *Carbrey v. Willis*, 7 Allen, 370; *Bloch v. Pfaff*, 101 Mass. 539; *Bellows v. Sackett*, 15 Barb. 96.

chose to abandon his user.^w This theory of title by appropriation was much modified by various decisions, as the nature of riparian rights was brought more fully under consideration,^x and ultimately it was determined that these riparian rights to the use and uninterrupted flow of streams were not acquired by appropriation at all, but that they existed and belonged to every riparian owner of land *ex jure naturæ*, whether he chose to make use of them or not.^y When, however, this change of opinion first arose, it was also held that the effect of appropriation was to give the riparian owner a right to sue for disturbance, for it was conceived that he could not sustain any damage by loss of water until he had applied it to a purpose of utility and that purpose was disturbed, for actual damage was always considered essential to support an action on the case.^z In process of time, however, this theory was also abandoned; and it appears now to be considered that an action will lie for every disturbance of riparian rights without evidence of appropriation of the water for any purpose of utility, and without even proof of any special damage, but simply on the ground that a legal right is injured by the disturbance, and that this is sufficient damage to support the action.^a Appropriation of the water of flowing streams for purposes of utility has thus gradually fallen from being considered a means of acquiring important water rights, to being deemed of no importance whatever, whether as a mode of gaining a right, or of acquiring a right to sue for disturbance.

Appropriation of water which flows into a well through the surrounding soil, gives no right to the owner of the well that the soil shall not be drained by the operations of owners of adjoining land in their own

Appropriation of water in a well.

^w *Williams v. Morland*, 2 B. & C. 910; 2 L. J. K. B. 191.

^x *Mason v. Hill*, 5 B. & Ad. 1; 2 L. J. N. S. K. B. 118. In the case of *Cocker v. Cowper* (5 Tyrw. 103), Parke, B., is reported to have said, that "the doctrine of appropriation has been much cut down in *Mason v. Hill*."

^y *Sampson v. Hoddinott*, 1 C. B. N. S. at p. 611; 26 L. J. C. P. at p. 150; *Mason v. Hill*, 5 B. & Ad. 1; 2 L. J. N. S. K. B. 118.

^z See judgment of Sir John Leach, V. C., in *Wright v. Howard*, 1 Sim. & St. 190; 1 L. J. Ch. 94.

^a See *post*, chapter IV.

ground — nor even that the water already collected in the well shall not be drawn away by their workings. That there is no natural right, and that no prescriptive right can be acquired to the uninterrupted flow of underground water which percolates through the soil in undefined or unknown channels, has been already shown; and the act of digging a well to receive such water cannot confer any right upon the owner of the well to the exclusive use of water percolating through the surrounding soil. As long, however, as the water remains in the well it is the property of the owner of the well, but it remains his only so long as it continues in his possession; and he cannot maintain an action against any person who, by the exercise of a lawful act in his own soil, causes the water to escape from his custody.^b And the law had been so settled in America long before it seems to have been in England.¹

If such diversion from another's well is done maliciously, some cases incline to hold the party doing so liable,² while others think the motive is immaterial, since he had a legal right to do the act itself.³

PURITY OF WATER.

With regard to the next class of easements in water — namely, those which relate to purity of water — it has been

^b *Chasemore v. Richards*, 7 H. L. C. 349; 29 L. J. Exch. 81; *Acton v. Blundell*, 12 M. & W. 324; 13 L. J. Exch. 289; *New River Co. v. Johnson*, 2 El. & El. 435; 29 L. J. M. C. 93; *Ballacorkish Mining Co. v. Dumbell*, L. R. 5 P. C. 49; 43 L. J. P. C. 19; *Phelps v. Nowlen*, 72 N. Y. 39.

¹ See *Greenleaf v. Francis*, 18 Pick. 117 (1836); *Parker v. Boston and Maine Railroad*, 3 Cush. 107; *Roath v. Driscoll*, 20 Conn. 533; *Chatfield v. Wilson*, 28 Vt. 49; *Wheatley v. Baugh*, 25 Penn. St. 528; *New Albany Railroad v. Peterson*, 14 Ind. 112; *Ellis v. Duncan*, 21 Barb. 230; *Village of Delhi v. Youmans*, 45 N. Y. 362; *Chase v. Silverstone*, 62 Me. 175, an elaborate judgment by Judge Virgin. So far as the early cases of *Smith v. Adams*, 6 Paige, 435; and *Dexter v. Providence Aqueduct Co.* 1 Story, 387, contain anything contrary to this principle, they must be considered as overruled.

² See *Greenleaf v. Francis*, 18 Pick. at p. 122; *Chasemore v. Richards*, 5 H. & N. 990, Am. ed.; *Wheatley v. Baugh*, 25 Penn. St. 533.

³ See *Chatfield v. Wilson*, 28 Vt. 49.

pointed out that all riparian owners have a natural right that the water of natural streams shall be suffered to remain in its natural pure state.¹ There is no such natural right in connection with artificial streams, but it is obvious that much difference exists between injuries from interruption of the flow of water and injuries from pollution of water, for interruption of the flow of water may arise from the exercise of a lawful act by a person on his own soil, but polluting a stream of water involves a nuisance on the land of other persons, and a trespass by the sending of impure matter on to their soil. The cases are, therefore, not analogous, and consequently the law is not identical.

No right to have the water of an artificial stream uninterrupted can be acquired by mere appropriation of the water; and no action for interruption can be maintained against the originator of the stream, nor against persons through whose land the water flows, unless a right to the uninterrupted flow has been acquired; but it was said in *Wood v. Waud*,^c that if either the originator of an artificial stream, or others, polluted the waters so as to be injurious to the tenant below, the case would be different. From this passage in the judgment of the court, it would appear that mere appropriation of the water of an artificial stream for a purpose of utility is sufficient to confer a right on the appropriator, that the water shall not be polluted to his detriment by any person who has not acquired a right to pollute it; the point, however, is not free from doubt, and the case of *Whaley v. Laing*^d should be noticed as bearing on the subject. In that case, which was

¹ See *Merrifield v. Lombard*, 13 Allen, 16; *Dwight Printing Co. v. Boston*, 122 Mass. 583.

^c 3 Exch. at p. 779; 18 L. J. Exch. at p. 314. Though there can be no right, natural or by prescription, to the uninterrupted flow of underground water, percolating through the soil; yet it is a wrongful act, in the absence of an easement, to pollute such water to the injury of another person. *Hodgkinson v. Ennor*, 4 B. & S. 229; 32 L. J. Q. B. 231. But see *Brown v. Illius*, 25 Conn. 583.

^d 2 H. & N. 476; 26 L. J. Exch. 327; in Exchequer Chamber, 3 H. & N. 675; 27 L. J. Exch. 422; *Stockport Waterworks Co. v. Potter*, per Bramwell, B., 3 H. & C. 300.

taken to the Exchequer Chamber, in which court the judges were divided in opinion, it appeared that a canal had been formed through land belonging to one Anderton, and the plaintiff, who had mines under Anderton's land, obtained permission from him, and from the canal company, to make a cut through the land to the canal, for the purpose of taking water from the canal to supply his engines. Chemical works were afterwards erected by the defendants, and they commenced pouring muriatic acid into the canal, which mixed with the water and passed from the canal to the plaintiff's boilers, which were consequently injured. The question was, whether the plaintiff, as he had no legal right to the water, but merely a license to use it, could sue the defendants for the damage. The form of the declaration caused considerable difficulty in determining the right of the plaintiff to maintain the action, but, apart from the question of pleading, the judges in the Court of Exchequer were unanimous in determining that the plaintiff was entitled to succeed. During the argument, Martin, B., said, that the sole question was, whether the plaintiff had a sufficient right to sustain the action against a stranger and a wrong-doer, and he thought he had, *because he was in actual possession of the flow of water*; Bramwell, B., however, thought that there was only a right or license to take the water from time to time, when the plaintiff wanted it; that he had not any legal right to the flow of water in its accustomed manner; and that as the water was polluted when he took it, he had never been in possession of any right to it otherwise than in a polluted state. The judgment was in favor of the plaintiff, on the ground that the plaintiff had, by permission of the owners of the canal, got possession of a certain quantity of water in his cistern, which water he was entitled to pump up from the cistern, as he would have been entitled to use it if he had taken it up in a bucket, — that upon emptying his cistern other water flowed in from the canal to supply its place, and that in consequence of the defendant's act, foul water flowed to the cistern, and that act, being without justification as to the defendant, gave the plaintiff a cause of action. It was particularly said in the judgment, that the

court gave no opinion whether the plaintiff had any possessory title to the water in the canal, so that if the defendants had stopped its flow to the plaintiff, or if the plaintiff had, in order to get the water, to go to the canal with a bucket, and had drawn it foul from the canal, any action could have been maintained, but that the judgment proceeded on the ground, that the defendants caused foul water to flow on the plaintiff's premises without right to do so. In the Exchequer Chamber six judgments were delivered by the respective judges, and much difference of opinion prevailed, but this was attributable mainly to the form of the declaration. Willes and Crowder, JJ., thought the judgment of the court below should be affirmed on the ground that the plaintiff was in possession, and the defendant was a wrong-doer. Crompton and Erle, JJ., thought that the declaration indirectly claimed a right to the flow of water, and not being supported by the evidence of any legal right, the plaintiff could not recover; but they added, that they did not say that an action might not lie if a man had permission from the owner of a pond to get water for his cattle, and if a stranger, knowing the probable and natural effect of his act, poisoned the water so that the cattle were injured — that probably in such a case an action would lie, but that the right of action would be founded not on the title or right to the water, but on the injury to the property of the plaintiff. Williams, J., thought the declaration was bad in substance, and that judgment should be arrested, but that the plaintiff was entitled to the verdict. He agreed with the barons of the Exchequer that no right to the water was intended to be claimed by the declaration, but that it merely meant that the defendants had no right to foul the water; but even if that were so the declaration should also have shown that the plaintiff was not a wrong-doer in taking the water, for that if he was a wrong-doer he would have no cause of action. Wightman, J., thought the defendants were entitled to judgment, for that the plaintiff had no legal right to the water, and that as against him the defendants could not be considered wrong-doers. Laying aside, therefore, the questions which arose from the form of the declaration, it will be

seen that the majority of the judges in the Exchequer Chamber approved of the decision of the court below.

The decision of Kindersley, V. C., in the case of *Wood v. Sutcliffe*,^e is somewhat at variance with the doctrine that a right of action for pollution of the water of an artificial stream may be acquired merely by appropriating the water, and applying it to a purpose of utility. The bill was filed for the purpose of obtaining an injunction to restrain pollution of the water of an artificial stream; and the plaintiff claimed a right to purity of water by prescription, by reason of twenty years' enjoyment: the vice chancellor said that there is no doubt that a person establishing works on a stream may, by long user of the water of that stream, although he has no proprietorship of the river or the water, acquire a right such as that which the plaintiffs insisted they had, and he is reported to have added, that not only may a person acquire such a right, but that a right may also be acquired to pollute water of an artificial or other stream by prescription. This report would lead a reader to infer that the vice chancellor thought that no right to purity of water could be acquired by mere appropriation, but that twenty years' enjoyment of pure water was necessary before the right could be gained; and, also, that no right to pollute could be gained except by user for twenty years. There can be no doubt that a person may acquire a prescriptive title to purity of water by enjoyment for twenty years; but if the right cannot be gained by mere appropriation, this difficulty arises, that during the twenty years, although a person fouling the water has no right to pollute it, and causes incalculable injury, yet, that the person injured has no remedy against him, because he has no right that the water shall remain pure, and the wrongful pollution may consequently be continued with impunity. The passage above referred to in the case of *Wood v. Waud*, and the judgments in the case of *Whaley v. Laing*, seem to establish that the injured party would have a right to sue, although he possessed no legal right which had been infringed; the reason, however, given in the judgment of the lower court in

^e 2 Sim. N. S. 163; 21 L. J. Ch. 253.

the latter case why he would be entitled to sue can hardly be considered satisfactory, whereas, Martin, B., expressed an opinion of a more satisfactory nature during the argument — namely, that the injured person would have a sufficient right to purity of the water to sustain an action for pollution against a stranger and a wrong-doer, for the simple reason *that he was in actual possession of the flow of water at the time the pollution was first caused*; or, in other words, that he had acquired a possessory title by appropriation, and that though such appropriation would not confer any right that the water should not be diverted or obstructed by the lawful act of another person on his own soil, yet that it was sufficient to confer a right that an injurious act should not be committed to his detriment, by a man who possessed no legal justification for the commission of the injury.^f

A right to pollute water, whether of an artificial or of a natural stream, may be acquired by grant, express or implied, or by prescription. Such a right is gained by prescription if the pollution has been continued, and if the stream has been prejudicially affected to the detriment of a person against whom the right is claimed for the full period of twenty years, provided the latter has submitted to the injury during that period.^{g 1}

It frequently happens that pollution of water of streams is for a considerable time imperceptible, or that, at all events, the detriment sustained by riparian proprietors is so slight that it is not, on account of the actual injury, worth consideration, or that the damage is too

Acquisition of right to pollute streams.

Pollution gradually increasing.

^f See *Tenant v. Goldwin*, 1 Salk. 360; 2 Ld. Raym. 1089; *Hodgkinson v. Ennor*, 4 B. & S. 229; 32 L. J. Q. B. 231.

^g *Wright v. Williams*, 1 M. & W. 77; 5 L. J. N. S. Exch. 107; *Wood v. Waud*, 3 Exch. 748; 18 L. J. Exch. 305; *Wood v. Sutcliffe*, 2 Sim. N. S. 163; 21 L. J. Ch. 253; *Murgatroyd v. Robinson*, 7 E. & B. 391; 26 L. J. Q. B. 233.

¹ That a right to pollute water may also in this country be acquired by prescription, if sufficiently clear and explicit, see *McCallun v. German-town Water Co.* 54 Penn. St. 40, a very instructive case on this point; and other cases cited in note, *ante*, p. 64; *Prentice v. Geiger*, 74 N. Y. 341.

trifling for the courts to recognize, and that the pollution then gradually increases till at length it becomes a serious nuisance and causes substantial injury. This often occurs when the drainage of towns is made to flow into a watercourse or river — when a town, small at first, produces sewage small in quantity, and causes little or no injury, but by gradually increasing in size, by the addition of new streets and houses, at length produces an increased amount of sewage, and so renders the stream little better than a common sewer, and then the riparian owners find themselves totally deprived of the water they had formerly used in a pure state. If in such case the drainage into the stream has continued more than twenty years, though the foulness of the water has been perceptible or injurious for less than that period, the question arises whether any right has been acquired to pollute the water, and, if a right has been gained by prescription, as to the extent of the right and the amount of injury to which the riparian proprietors are bound to submit. The latter question belongs to a subsequent part of this work, when the extent of easements will be considered, but here it may be remarked, that it is a matter of doubt whether any right to pollute the water can be acquired by such user. *Goldsmid v. The Tunbridge Wells Improvement Commissioners*^a was a case of this kind. It appears that a brook flows near the town of Tunbridge Wells, and that an act of parliament was passed to enable the defendants to drain the town and make sewers, and to turn any drain or sewer into any common ditch or watercourse; that Tunbridge Wells had of late years, before the suit, greatly increased in extent, and at the time of the suit was still increasing; that the drainage of the town had been much improved, and that a considerable increase of sewage had been carried into the drains and thence to the brook, and that the water of the brook, which was formerly pure and suitable for drinking and household purposes, was no longer fit to drink or for domestic use on account of the pollution. The plaintiff

*Goldsmid
v. Tun-
bridge
Wells Im-
provement
Commis-
sioners.*

^a L. R. 1 Eq. 161; 35 L. J. Ch. 88; on appeal, L. R. 1 Ch. App. 349; 35 L. J. Ch. 382.

was a riparian proprietor. In delivering judgment in the cause the master of the rolls said: "The evidence rather points to something like this, that the thing has been going on for such a number of years that it would be too late to complain of it now; in fact, one witness says it has been going on for fifty years — several say it has been going on for twenty years. I have no doubt it has been extending for some time, and that it has been perceptible to some extent for some time, at all events from 1846" (the case was argued in 1865) — "as soon as the first local act came into operation. And it is to be observed that the amount of the sewage will show its influence in the direct proportion to the quantity that is sent forth on a greater extent of country; that is to say, a certain amount of sewage may produce injurious effects gradually diminishing for a mile, and a greater amount of sewage may produce greater injurious effects which may extend for two miles; but I do not doubt that there is some point at which, probably, with almost any amount of sewage, the stream would be ultimately comparatively pure, and that it is only a question of degree. . . . It is important to observe what the position of a gentleman in the situation of the plaintiff is. If he comes to the court and complains very early, then the evidence is, that 'it is not perceptible' — 'it is wholly inappreciable' — and you get evidence after evidence for the defendants (the pollution being slight and perhaps only observable at some times and on some occasions), saying, 'You have no proof at all that there is any appreciable pollution, and you must wait until it becomes a nuisance.' Then he waits five or six years until it is obvious to everybody's sense that the pollution is considerable, and then they say, 'You have come too late, you have allowed this to go on for twenty years, and we have acquired an easement over your property, and a right of pouring the sewage into it.' My opinion is, that any person who has a watercourse flowing through his land, and sewage which is perceptible is brought into that watercourse, has a right to come here to stop it; and that when the pollution is increasing, and gradually increasing from time to time, by the additional quantity of sewage poured into it, the per-

sons who allow the polluted matter to flow into the stream are not at liberty to claim any right or prescription against him." On appeal, Turner, L. J., with the concurrence of Knight Bruce, L. J., said: "In the course of the argument upon these points, it was suggested on the part of the plaintiff, that unless the court interposed, a prescriptive right to discharge the sewage into the stream, to the prejudice of the plaintiff's estate, might be acquired by the defendants; to which it was answered on the part of the defendants that such prescriptive right, if it could at all be acquired, had been already acquired by them. It will be convenient, therefore, first to dispose of this point, and I am of opinion that the defendants have not acquired any such prescriptive right. I assume, but without meaning to give any opinion upon the point, that such a right might well be acquired, but then I think that it could be acquired only by a continuance of the discharge of the sewage prejudicially affecting the estate, at least to some extent, for the period of twenty years, and I think that the evidence sufficiently shows that the discharge has not prejudicially affected the estate for so long a period." If, therefore, a right to pollute a stream can be acquired by prescription when the pollution is at first slight and imperceptible, but gradually increases, it would seem that the prescriptive period would begin to run when the pollution was first perceptible and prejudicially affected the servient estate, or in other words, when the servient owner first became conscious of the injury, and had an opportunity of resisting the user by suit or action.

The third and last class of easements which can be acquired in water are rights to take water for use. If a stream is natural, it has been explained that all riparian owners have a natural right to use the water as it flows by their land, and that they may take water from the stream for consumption on their riparian estates, provided they do not cause sensible injury to other riparian proprietors. There is no such natural right to take water from *artificial* streams, and no riparian owner has a right, until he

Right to
take water
for use.

has used the water for twenty years, that riparian owners higher up the stream should not prevent the water flowing down to him in its accustomed manner; but instead of a natural right to take the water of artificial streams for use, riparian owners have a sort of proprietary right to take it while it remains on their land, and riparian owners lower down the stream, until they have acquired an easement, cannot prevent their so doing. Thus in *Wood v. Waud*⁴ it was said: "The proprietor of the land through which the Bowling Sough flows has no right to insist on the colliery owners causing all the water from their works to flow through their land. These owners merely get rid of a nuisance to their works by discharging the water into the sough, and cannot be considered as giving it to one more than another of the proprietors of the land through which that sough is constructed; each may take and use what passes through his land, and the proprietor of the land has no right to any part of that water until it has reached his own land; he has no right to compel the owners above to permit the water to flow through their land for his benefit, and consequently he has no right of action if they refuse to do so." And this principle was deliberately followed in a recent important case before the Privy Council,¹ where *Wood v. Waud* was fully approved.

A right to take water for use to any extent, either from a natural or artificial stream or from a pool of water or a well situate wholly in another person's land, may be acquired by grant, express or implied, or by prescription, and it will be noticed that the use of water is one of the classes of easements expressly mentioned in the Prescription Act as being capable of acquisition under that statute.^j

Acquisition by grant or prescription.

⁴ 3 Exch. at p. 779; 18 L. J. Exch. at p. 14.

¹ *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk*, 4 App. Cas. 121 (1879).

^j It has been shown that a right to take water in the land of another person is an easement, and not a profit à prendre; ante, chapter I. p. 7.

WAYS.

Rights of way — that is, private rights of way, for they alone are easements — may be acquired by grant, express or implied, or by prescription; this class of easements being expressly provided for in the Prescription Act; ^{Ways, how acquired.} but a private right of way can in no case be acquired by *dedication*, whether it be designed for the use of a private individual or of a body of persons — as the inhabitants of a parish. The public alone can take a right of way by dedication; inhabitants of a parish or any other body must take by grant.¹

One of the most common modes of acquiring a right of way in America is by prescription; but as such method of acquisition has been so fully discussed in the first section of this chapter, and most of the illustrations there given were cases of easements of this character, it is unnecessary to repeat what was there laid down. ^{Ways by prescription.}

Many questions relative to grants of rights of way have arisen in consequence of vendors of land using in their deeds of conveyance general words only with reference to easements intended to be granted, such as the word “appurtenances,” or the phrase “with the ways and other easements used and enjoyed with the land.” It is obvious that if rights of way are strictly appurtenant to land which is being conveyed, that is, if they are rights which the vendor is entitled to enjoy in the land of another person, they are not newly created rights when they are assigned to the purchaser, but pass to him as a part of the land purchased; but that if the vendor has been in the habit of using a way over a part of *his own ground* which he is not selling, the way, if any right thereto is given to the purchaser, is an easement ^{Grants by general words.}

¹ The Prescription Act does not preclude rights of way from being claimed and acquired by prescription at common law. *Holford v. Hankinson*, 5 Q. B. 584.

² *Vestry of Bermondsey v. Brown*, 35 Beav. 226; L. R. 1 Eq. Cas. 204. And see *Wilder v. St. Paul*, 12 Minn. 208; *Hale v. McLeod*, 2 Metc. (Ky.) 98.

newly created by the deed of conveyance, for it was not an easement before severance of the property. These cases are essentially different, and it has been shown that with reference to grants of ways or other easements by general words, different forms of words will pass a way strictly appurtenant from those which are requisite to pass or newly grant a way which the vendor has been in the habit of using during unity of ownership. This matter has already been treated at length when the subject of grants was under consideration, and it is therefore unnecessary again to discuss the subject.

A matter of some importance to be considered in connection with grants of rights of way is the effect of Grant of ways shown in plans. plans which show roads either made or intended to be made, annexed to conveyances or leases of land, or exhibited at the time of a sale, and which may in the latter case operate as an inducement to a person to buy the land. Of course if the roads are marked on the plan as being over the property of a person other than the vendor, if there is no road really there, or no right of way over the road, the exhibition of the plan could have no effect whatever in the creation of a right of way, the only result being possibly a right of action by the purchaser who had been deceived against the vendor for the misrepresentation. But if the soil, where the road is represented in the plan as being, is the property of the vendor, a very different question arises, namely, whether the purchaser would not become entitled to a right of way over the land marked as road in the plan. If the plan should be expressly referred to in the deed of conveyance, and, in fact, be embodied in the deed by reference, though the way might not be otherwise referred to, it seems probable that the deed and the plan together would operate as a grant of a right of way, or that the vendor would be estopped from denying the easement; but if the plan should be merely exhibited at a sale of land and there should be no reference to it in the conveyance it is difficult to see by what precise means the purchaser could become entitled to a right; it scarcely seems there could be any grant implied; for to imply such a grant would be like adding a term to a written contract by parol

evidence, nor is it likely that there could be any right by estoppel; for there is nothing in the deed whereby the vendor could be estopped; the probability therefore is that the purchaser would acquire no right to a way at all; but possibly he could sue the vendor for damages. In the case of *Glave v. Harding*,^m Pollock, C. B., appeared to have an opinion that the mere exhibition of a plan at a sale showing a road would have the effect of entitling a purchaser to a right of way, but it was not necessary to determine this for the purpose of deciding the case, and it was intimated that the other judges did not entertain the same view. If, however, in addition to the plan, roads and ways corresponding with those shown in the plan are mentioned in the deed of conveyance, though there may be no grant of them in terms, there is no doubt the deed and the plan together may operate as a grant of right of way, even though there are no roads made in the places shown in the plans.ⁿ

THE AMERICAN DOCTRINE

on this subject is, that if land be conveyed as bounding upon a street, described in the deed, and the grantor has no interest in the street so described, and did not profess to have, the mere reference to such street does not create an implied *covenant* between the grantor and the grantee that such a street has been legally laid out, on which the grantor can be held liable to the grantee, if the street be afterwards closed by those having a right so to do.¹ But that where the grantor

^m 3 H. & N. 944; 27 L. J. Exch. at p. 292.

ⁿ *Espley v. Wilkes*, L. R. 7 Exch. 298; 41 L. J. Exch. 241; *Harding v. Wilson*, 2 B. & C. 96.

¹ See *Howe v. Alger*, 4 Allen, 206, qualifying some of the earlier dicta in Massachusetts, apparently *contra*; *Brainard v. Boston and New York Central Railroad Co.* 12 Gray, 407; *In re Mercer Street*, 4 Cow. 542; *Underwood v. Stuyvesant*, 19 Johns. 181; *Livingston v. Mayor of New York*, 8 Wend. 85. *Howe v. Alger* was subsequently approved in *Hennessey v. Old Colony Railway Co.* 101 Mass. 541. And *à fortiori*, such a deed does not imply a covenant that the grantor will grade the street so described, or make it suitable for travel; but merely that the grantee may pass and repass upon it. *Hennessey v. Old Colony Railway Co.* 101 Mass. 540.

in such case is the owner of the adjoining land, described in his deed as an existing street, he is thereby *estopped* to deny the existence of such street, and from setting up any claim, or doing any acts inconsistent with the grantee's use of the street or way; and such estoppel applies to the grantor, or his heirs, and to those subsequently claiming under him.¹ And this doctrine of estoppel arises not only when the street or way is described in the deed itself;² but also where the deed merely refers to a plan on which the street is drawn; for by such reference the plan is, for that purpose, made a part of the deed itself; especially where it is recorded in the same office or registry where the deed is entered for record.³ And such estoppel extends not only to the way or street *immediately adjoining* the land granted, but to all other connecting ways which are shown on the plan so referred to, which will enable the grantee to reach public ways in any direction; to the extent at least of the ownership of the grantor in such connecting streets.⁴ Whether such estoppel exists when the deed neither defines the way nor refers to a plan, but a plan is actually shown at the sale, indicating a street, and oral representations to that effect are made as the inducement of the sale, does not seem to have been judicially settled.

Rights of way of necessity are acquired by implied grant.

Ways of necessity. A grant of a way of necessity is presumed to have been made whenever land has been sold which is inaccessible except by passing over the adjoining land of the grantor or by committing a trespass upon the land of a stran-

¹ *Howe v. Alger*, *supra*, at p. 265; *Farnsworth v. Taylor*, 9 Gray, 162; *Rodgers v. Parker*, *Ib.* 445; *O'Linda v. Lothrop*, 21 Pick. 292; *Parker v. Framingham*, 8 Met. 260; *Howard v. Rogers*, 4 H. & J. 278; *Smyles v. Hastings*, 22 N. Y. 217, and 24 Barb. 44; *Tufts v. Charlestown*, 2 Gray, 271; *White v. Flannigain*, 1 Md. 542; *Parker v. Smith*, 17 Mass. 413.

² As in *Tufts v. Charlestown*, 2 Gray, 271; *Gaw v. Hughes*, 111 Mass. 296.

³ *Farnsworth v. Taylor*, 9 Gray, 162; *Fox v. Union Sugar Refinery*, 109 Mass. 292.

⁴ *Fox v. Union Sugar Refinery*, 109 Mass. 292, and cases cited. See, also, *Tobey v. Taunton*, 119 Mass. 410; *Stetson v. Dow*, 16 Gray, 372; *Thomas v. Poole*, 7 Gray, 83; *Rodgers v. Parker*, 9 Gray, 445.

ger, or when an owner of land sells a portion and reserves a part which is inaccessible except by passing over the land sold. This species of right has been recognized from very early times, and is said to depend upon the principle that when a grant is made, every right is also presumed to have been granted, without which the subject of the grant would be useless. This principle may well be applied to the case of a grant of land-locked land, for the grantor then gives the way of necessity; but the case is different if he reserves the soil which is land-locked, for then it is not he but the grantee who must be presumed to grant the way, and it is difficult to see why the grantor, who does not expressly reserve a way for himself, should become entitled to a way of necessity under an implied grant, since a man who sells land and reserves an adjoining house does not become entitled by implied grant to a right to light for windows overlooking the land unless he expressly reserves such an easement in the deed of conveyance: ° it may be that the right is given on the ground of public policy, that the land may not be rendered useless and unprofitable: but whatever may be the principle upon which the right is presumed to have been granted, the law has always and in every case annexed a right of way of necessity to the ownership of land-locked ground when that and the surrounding land have been severed by sale.º

A way of necessity can be acquired only when a landowner has *no other way* to his ground. It has sometimes been *thought*

° In *Suffield v. Brown*, 4 De G., J. & S. 185; 33 L. J. Ch. at p. 259, Lord Westbury, speaking of implied reservations of apparent and continuous easements, said: "I cannot agree that the grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him the grantor. . . . The absolute sale and grant of the land in or over which they are claimed is inconsistent with the continuance of anything abridging the complete enjoyment of the thing granted."

º *Clark v. Cogge*, Cro. Jac. 170; *Gayford v. Moffatt*, L. R. 4 Ch. App. 133; *Pinnington v. Galland*, 9 Exch. 1; 22 L. J. Exch. 348; *Howton v. Frearson*, 8 T. R. 50; *Holmes v. Goring*, 2 Bing. 76; 2 L. J. C. P. 134; *Dand v. Kingscote*, 6 M. & W. 174; 9 L. J. N. S. Exch. 279.

that a way of necessity could be claimed if a person had none but an inconvenient way to his land, and this view has been supported by a dictum of Mansfield, C. J., in the case of *Morris v. Edgington*.² That learned judge said: "I say nothing of what is a way of necessity; I know not how it has been expounded, but it would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had;" and a similar view was expressed with regard to a watercourse in a recent case,³ but the balance of authority shows that a man cannot acquire a way of necessity if he has any other means of access to his land, however inconvenient it may be, than by passing over his neighbor's soil.⁴

Every right of way of necessity is founded upon a presumed grant, and unless a grant can be presumed, no way of necessity can be claimed, even though an owner is in consequence totally deprived of all means of access to his land. A grant of this kind is generally presumed when property in land has been severed by sale, and when one portion is inaccessible except by passing over the other, or by trespassing on the land of a stranger. No grant of right of way over the stranger's land can be presumed, and therefore no way of necessity over that land can be acquired, but a grant by the owner of one of the severed portions to the owner of the other can be presumed, and therefore a way of necessity over his soil can be claimed. In the case of *Bullard v. Harrison*,⁵ Lord Ellenborough, C. J., complained of the pleadings in the action because the plea, he said, "seems to suppose that whenever a man has not another way, he has a right to go over his neighbor's close. But," he added, "that is not so;" and that a way of necessity is a thing founded in grant.

² 3 Taunt. at p. 31.

³ *Watts v. Kelson*, L. R. 6 Ch. App. at p. 175; 40 L. J. Ch. at p. 129.

⁴ *Holmes v. Goring*, 2 Bing. 76; 2 L. J. C. P. 134; *Proctor v. Hodgson*, 10 Exch. 824; 24 L. J. Exch. 195; *Dodd v. Burchell*, 1 H. & C. 113; 31 L. J. Exch. 364. See *Lawton v. Rivers*, 2 McCord, 445.

⁵ 4 M. & S. 387.

For this reason it has been held that there can be no way of necessity if the inaccessible land has been acquired by escheat; " and for the same cause a landowner cannot create a way of necessity over his neighbor's soil by any act of his own, as, for instance, by building a house to which he has no means of access except by crossing his neighbor's land, unless, indeed, his neighbor sold him the site of the house for the express purpose that the house should be built."

THE AMERICAN LAW.

The American decisions are quite in harmony with the English upon this subject, and support the right of way by necessity, both to the grantee,¹ legal or equitable,² and, by reservation, to the grantor,³ even if he has given a warranty deed of the land over which he claims a way, free from all incumbrances;⁴ for by implication of law the very *estate granted* is an estate in fee, with a right of way reserved or carved out thereof, in the same manner as if such right had been expressly reserved in the deed. The right is created to one of two simultaneous grantees,⁵ or co-devisees under the same will,⁶ over the land of the other; or to tenants in com-

" Proctor v. Hodgson, 10 Exch. 824; 24 L. J. Exch. 195.

" Roberts v. Karr, 1 Taunt. per Lord Ellenborough, C. J., at p. 498; Davies v. Sear, L. R. 7 Eq. 427; 38 L. J. Ch. 545; Espley v. Wilkes, L. R. 7 Exch. 298; 41 L. J. Exch. 241.

¹ Holmes v. Seely, 19 Wend. 507; New York Life Ins. Co. v. Milnor, 1 Barb. Ch. 353; Kimball v. Cochecho Railroad, 7 Foster, 448; Brakeley v. Sharp, 9 N. J. Eq. 9; S. C. 10 N. J. Eq. 206; Wheeler v. Gilsey, 35 How. (N. Y.) 139; Wissler v. Hershey, 23 Penn. St. 333; Thomas v. Bertram, 4 Bush (Ky.), 317; Brown v. Berry, 6 Cold. (Tenn.) 98; Snyder v. Warford, 11 Mo. 513; Smyles v. Hastings, 22 N. Y. 217.

² Simmons v. Sines, 4 Abb. Dec. (N. Y.) 246.

³ Nichols v. Luce, 24 Pick. 104; Amer. Co. v. Bradford, 27 Cal. 366; Pingree v. McDuffie, 56 N. H. 306; Bowen v. Conner, 6 Cush. 132.

⁴ Brigham v. Smith, 4 Gray, 297. This reservation might not exist in favor of a grantor, when he knows the whole estate conveyed is to be covered by a building, or otherwise used for a purpose absolutely inconsistent with any right of way over it. Seeley v. Bishop, 19 Conn. 128.

⁵ Collins v. Prentice, 15 Conn. 39.

⁶ Tracy v. Atherton, 35 Vt. 53; Pearson v. Spencer, 1 B. & S. 580;

mon making partition of the estate by which the portion of one is excluded from the highway. So whether a grant be voluntary or involuntary, as where title is acquired by a levy of execution.¹ An execution creditor who levies, by metes and bounds, upon a lot which has no contact with a highway, acquires a right by necessity over adjoining land of *his debtor*, even though he might, with equal convenience, have taken other land of his debtor in satisfaction of the execution,² or might have expressly included such right in his levy, but did not do so.

It may not be strictly exact to say it is a right of way *by necessity*, for necessity will not of itself justify an entry upon another's lands. It is only a circumstance resorted to for the purpose of ascertaining the intention of the parties to a grant and raising an *implied grant*. It is a mode of proving the voluntary grant; and when so proved the effect is the same as if an *express* grant had been made.³ It exists, therefore, only when there has been a grant. But this right certainly *depends upon necessity*. It has been said to exist "only where the person claiming it has no other means of passing from his estate into the public street or road."⁴ Perhaps by "necessity" is not meant an "absolute physical necessity." Probably a "reasonable necessity" would be sufficient, as if a way over the land of the party claiming the right could not be made without unreasonable labor and expense.⁵

Fetters v. Humphreys, 18 N. J. Eq. 260. See *Smyles v. Hastings*, 24 Barb. 44; S. C. on appeal, 22 N. Y. 217.

¹ *Pernam v. Wead*, 2 Mass. 203; *Russell v. Jackson*, 2 Pick. 573.

² *Taylor v. Townsend*, 8 Mass. 417, *Parker, J.* And if different creditors successively levy upon portions of the front land of their debtor, each creditor leaving access to the highway for the debtor except the last, the debtor's right of way, by necessity, is only over the estate of that creditor whose first levy creates the necessity, and not over the land of those who had previously levied. *Russell v. Jackson*, 2 Pick. 573.

³ See *Nichols v. Luce*, 24 Pick. 104.

⁴ *Gayetty v. Bethune*, 14 Mass. 55; *Brigham v. Smith*, 4 Gray, 297; *O'Rorke v. Smith*, 11 R. I. 262; *Lide v. Hadley*, 36 Ala. 627; *Viall v. Carpenter*, 14 Gray, 126; *Smith v. Kinard*, 2 Hill (S. C.), 642; *Alley v. Carleton*, 29 Tex. 78.

⁵ *Pettingill v. Porter*, 8 Allen, 1; *Oliver v. Pitman*, 98 Mass. 50; *Car-*

Mere convenience will not be sufficient ;¹ nor “ even great convenience.” The existence of a bluff across the land, separating the rest of the land from the highway, which it is “ exceedingly difficult to pass,” but which is not impassable, does not give the right to pass over another’s land, though, perhaps, “ an *impassable* mountain, river, or other barrier,” might.² And the fact that it would cost \$200 or \$300 to build a road over the land to the highway has been held not sufficient to give a way by necessity.³

This right of way by necessity is not confined to other land of the grantor *immediately adjoining* the land granted. For if A. owns an inaccessible lot, and also another bounding on a highway, but which are separated by the intervening land of B., over which A. has a right by prescription to pass from his front lot to his rear lot, a grant of the rear lot conveys his prescriptive way over the land of B., and also a way by necessity, in continuation thereof, over his front lot to the highway.⁴

Whenever the necessity exists, as before explained, the right of way exists over land of the grantor, although the grantee might have a private way laid out for him over land of other adjoining owners, upon application to the public authorities, and making compensation therefor, according to the statutes in some states provided.⁵ Whether the former would

brey v. Willis, 7 Allen, 364 ; Leonard v. Leonard, 2 Allen, 543 ; Ewart v. Cochrane, 7 Jur. N. S. 925 (not in the Reports) ; White v. Bradley, 66 Me. 254.

¹ Trask v. Patterson, 29 Me. 499 ; Anderson v. Buchanan, 8 Ind. 132 ; Hall v. McLeod, 2 Metc. (Ky.) 98 ; Ogden v. Grove, 38 Penn. St. 487. And therefore A. has no right to pass from one part of his farm to another, over intervening land of B., merely because it is much shorter and more convenient than to go around by the public road.

² Nichols v. Luce, 24 Pick. 105 ; Oliver v. Pitman, 98 Mass. 50.

³ Allen v. Kincaid, 11 Me. 155. And if the grantor owns other land in severalty, over which the grantee may have a convenient way to the highway, he does not acquire a right over another lot owned by the grantor *and others*, tenants in common, merely because this is more convenient for him. Collins v. Prentice, 15 Conn. 423.

⁴ Leonard v. Leonard, 2 Allen, 543.

⁵ Pernam v. Wead, 2 Mass. 203 ; Collins v. Prentice, 15 Conn. 423.

continue after the latter had in fact been lawfully acquired, will be considered in a subsequent chapter.

BY STATUTE.

In many American states statutes exist, as before stated, by which, on the petition of a landowner who is remote from a highway, the public authorities have power to lay out a way for him over intervening land to the public road, the damages for which to the landowner are to be paid by the party benefited. But as the Constitution of the United States, as well as of most separate states, forbids the taking of private property, except for "public uses," without the owner's consent, the question has often arisen whether such statutes are constitutional; and there is some difference of opinion in the courts upon this question, arising, perhaps, from the different language of the statutes in question. In New York and many other states they have been repeatedly declared contrary to the Constitution and void, and the party using the way so laid out has been held a trespasser.¹ And therefore in some states the Constitution has been amended expressly authorizing the laying out of such ways, as in New York; but the question still remains whether they are not repugnant to the Constitution of the United States, which makes no such provision.

On the other hand, in Massachusetts and some other states, such statutes have been held to be constitutional, because, by force of the statute in such states, such ways are not merely for private use, but though laid out at the special instance of a private person, they are open to the public for travel, and under the control of the public authorities, and may be discontinued when they see fit, and the town is liable for injuries to travelers therein, in the same manner as in public highways;² and, therefore, they are *quasi* public ways, although

¹ Taylor v. Porter, 4 Hill, 140; White v. Clack, 2 Swan, 230; Osborn v. Hart, 24 Wis. 89; Sadler v. Langham, 34 Ala. 311; Nesbitt v. Trumbo, 39 Ill. 110; Dickey v. Tennison, 27 Mo. 373; Bankhead v. Brown, 25 Iowa, 540, a very able case on this point; Stewart v. Hartman, 46 Ind. 331; Wild v. Deig, 43 Ind. 455. See, also, 6 Am. Law Rev. 197; Witham v. Osburn, 4 Oregon, 318.

² Proctor v. Andover, 42 N. H. 348.

called by different names, such as "private and particular ways," "pent roads," "township roads," &c.¹

A more delicate question still arises, whether a private way can be lawfully laid out, not terminating in any public road, but merely connecting two lots of A., and laid out over an intervening lot of B. Such a way was sustained in a case in Connecticut,² though the constitutionality of the act was not decided. But elsewhere the validity of an act allowing such a proceeding has been more than questioned.³

¹ See *Denham v. County Commissioners*, 108 Mass. 202; *Flagg v. Flagg*, 16 Gray, 175; *Hickman's case*, 4 Harrington, 580; *Perrine v. Farr*, 2 Zab. 356; *Warren v. Bunnell*, 11 Vt. 600; *Metcalf v. Bingham*, 3 N. H. 459; *Clark v. Boston, &c. Railroad*, 4 Foster, 118.

² *Reynolds v. Reynolds*, 15 Conn. 83.

³ See *Robinson v. Swope*, 12 Bush (Ky.), 21; *Hall v. Commissioners of Lincoln*, 62 Me. 325. And see *Killbuck v. Private Road*, 77 Penn. St. 39.

CHAPTER III.

ON THE EXTENT AND MODE OF USER OF EASEMENTS.

SECT. 1. — *On the Extent and Mode of User of Easements generally.*

WHEN easements have been acquired by one of the modes pointed out in the preceding chapter, it is very important that a dominant owner should be fully acquainted with the limit and how he is entitled to make use of his right, that he may not by excessive user commit a trespass against the servient owner, or by checking his user unconsciously deprive himself of some part of his lawful enjoyment. For the servient owner this knowledge is also essential, that he may, on the one hand, prevent encroachment by the dominant owner, and any increase of the burden on the servient estate ; and, on the other hand, that he may not, by undue interference with the user of the right, involve himself in needless litigation with the dominant owner. In the case of natural rights, too, it is essential to understand their extent and legitimate mode of enjoyment ; for the natural rights of one person are, in some cases, limited by those of others, and the natural rights of the one do not entitle him to the absolute and uncontrolled enjoyment of the whole of the subject of those rights : but they are so restricted that the natural right of others may not be unduly curtailed or rendered useless by his enjoyment. To give an instance of this, riparian proprietors of a natural stream have rights to the uninterrupted flow of the stream, and also to use the water as it flows past their land ; these, however, are not absolute and uncontrolled rights, but being somewhat conflicting are each limited by the other, so that all riparian proprietors may have a due and reasonable enjoyment of both : one pro-

prietor may not use and consume so much of the water as to deprive another of the beneficial effect of the flow of the stream, and the other cannot insist upon having the flow so uninterrupted that the first shall not use and consume any of the water for the benefit of his estate: it has, on this principle, been said that "if the user of the stream by the plaintiff for irrigation was merely an exercise of his natural right, such user, however long continued, would not render the defendant's tenement a servient tenement, or in any way affect the natural rights of the defendant to use the water."^a But although natural rights cannot, except in the manner and to the extent just mentioned, be affected or curtailed by the natural rights of other persons, they may be abridged or absolutely suspended by easements acquired adversely to those rights: for instance, a riparian proprietor of a natural stream has a natural right to the uninterrupted flow of the water, yet another person may, by twenty years' user, acquire an adverse easement, entitling him to divert the course of the stream or diminish the quantity of the water accustomed to flow to the riparian proprietor by consuming it upon his land.^b

If an easement has been granted by deed, the ordinary rule which governs in similar cases prevails, namely, that the rights of the parties to the deed must be ascertained from the words of the deed, and the extent of the easement cannot be determined from any other source.^c But though this is the general rule, it is subject to the modification that surrounding circumstances may be taken into consideration in order to ascertain the intention of the parties

Measure of
easements
granted by
deed.

^a *Sampson v. Hoddinott*, 1 C. B. N. S. at p. 611; 26 L. J. C. P. at p. 150; *Embrey v. Owen*, 6 Exch. 353; 20 L. J. Exch. 212; *Wright v. Howard*, 1 Sim. & St. 190; 1 L. J. Ch. 94.

^b *Bealey v. Shaw*, 6 East, 209; *Wright v. Howard*, 1 Sim. & St. 190; 1 L. J. Ch. 94.

^c *Whitehead v. Parks*, 2 H. & N. 870; 27 L. J. Exch. 169; *Northam v. Hurley*, 1 E. & B. 665; 22 L. J. Q. B. 183; *Hodgson v. Field*, 7 East, 613; *Henning v. Burnet*, 8 Exch. 187; 22 L. J. Exch. 79; *Williams v. James*, L. R. 2 C. P. 577; 36 L. J. C. P. 256; *Blatchford v. Mayor of Plymouth*, 3 Bing. N. C. 691; 6 L. J. N. S. C. P. 217.

to the deed,¹ for it might operate very unjustly that a grant should be construed in its widest sense, irrespectively of the condition of things to which it had reference when it was made^d or if it were construed so strictly that the intended benefit of a grant might be lost, owing to some change in circumstances external to the subject of the grant.^e

Although the extent of an easement, acquired by deed, may be indefinite by the terms of the deed, yet its extent may be fixed by the use made thereof by the grantee. Thus, where a railroad company obtained by deed a right to lay an iron pipe through another's land, to convey water from a spring, which also supplied the grantor's land, and the grantees laid down, and used for several years, merely a two-inch pipe, it was held that the extent of the right was thereby limited, and that they could not substitute a four-inch pipe.²

¹ See *Hull v. Fuller*, 4 Vt. 199; *Fitzhugh v. Raymond*, 49 Barb. 646.

^d *Wood v. Saunders*, L. R. 10 Ch. 582; 44 L. J. Ch. 514.

^e *Finlinson v. Porter*, L. R. 10 Q. B. 188; 44 L. J. Q. B. 56; *United Land Co. v. Great Eastern Railway Co.* L. R. 10 Ch. App. 586; 44 L. J. Ch. 685.

² *Onthank v. Lake Shore, &c. Railroad*, 71 N. Y. 194. Earl, J., said: "After the grantee had once laid its pipe, and thus selected the place where it would exercise its easement, thus granted in general terms, what was before indefinite and general became fixed and certain, and the easement could not be exercised in any other place. This is confessedly so in reference to rights of ways granted in similar terms. Washb. on Easem. 225, 240; *Wynkoop v. Burger*, 12 Johns. 222. And the same rule of construction was applied to the right to lay an aqueduct from a spring granted in general terms in *Jennison v. Walker*, 11 Gray, 423. In that case Bigelow, J., said: 'Where an easement in land is granted in general terms, without giving definite location and description to it, so that the part of the land over which the right is to be exercised cannot be definitely ascertained, the grantee does not thereby acquire a right to use the servient estate without limitation as to the place or mode in which the easement is to be enjoyed. When the right granted has been once exercised in a fixed and definite course, with the full acquiescence and consent of both parties, it cannot be changed at the pleasure of the grantee.' He says: 'This rule rests on the principle that when the terms of a grant are general or indefinite so that its construction is uncertain and ambiguous, the acts of the parties contemporaneous with the grant giving a practical construction to it, shall be deemed to be a just exposition of the intent of the parties.'

"It is clear, then, that the right to lay the pipe under plaintiff's grant

So a grant of a right to open the grantor's land when it may be found necessary for the purpose of laying pipes through it, with liberty to keep and support such pipes therein forever, does not expressly or by implication grant a right to change the location of the pipes, after they are once laid.¹ But in a grant of a right "of using a well on the grantor's land and of taking water therefrom, by pipes, or otherwise," the grantee is not confined to taking it by pipes, but may take the water by a rope and bucket, even though the grantor offers to lay a pipe at his own expense.²

If an easement is created by a grant which can be proved by deed the common rule applies that the grant is to be construed most strongly against the grantor. It is necessary to remark that this rule has as much application with reference to grants of easements as it has with reference to any other kind of grants, as Construction of grants most strongly against the grantor. it was argued in a recent case that as the words of the grant were unusually extensive the court would throw upon the dominant owner, that is, the grantee, the strict proof that he was entitled to the easement he claimed; but Hall, V. C., did not admit the justice of that argument, and said that no authority was cited in favor of that proposition as applicable to a dispute or question relating to the extent of an easement created by grant, and that the cases that had been referred to to support the argument were cases of rights to easements originated by user in which the precise terms of the grant

was fixed by the act of the grantee and the acquiescence of the grantor to the place taken, and it cannot be exercised in any other place across plaintiff's land. But why is not the right also fixed for the same reasons as to the size of the pipe and the quantity of water to be diverted? I can perceive no reason for confining the operation of this rule to the mere place where the right is to be exercised. There is the same reason for applying it to the entire right granted." See, also, *Bannon v. Angier*, 2 Allen, 128.

¹ *Chandler v. Jamaica Pond Aqueduct*, 125 Mass. 550; *Jennison v. Walker*, 11 Gray, 423. And see similar principles laid down in *Bannon v. Angier*, 2 Allen, 128; *Jones v. Percival*, 5 Pick. 485.

² *Austin v. Cox*, 118 Mass. 58. The mode of use may be changed unless it becomes thereby more onerous to the servient estate. *Bissell v. Grant*, 35 Conn. 288.

could not be obtained.^a The vice chancellor, however, added that though he commenced by taking the above as the general rule of construction, yet that it often happens that the rule has not such application, for said he, you must put a fair and reasonable construction upon the instrument itself, and you generally find quite enough to enable you to construe the instrument without the rule having any influence either the one way or the other. A remark to the same effect was made by Mansfield, C. J., in the old case of *Morris v. Edgington*,^b when he said, speaking of a right of way granted in a lease, "All deeds are to be most strongly taken against the maker; and all deeds and writings are to be taken *secundum subjectam materiam*."

It has been said that an easement cannot be acquired by prescription if a grant of that easement would have been at variance with the purpose of an act of parliament, because, in such a case, a grant cannot be presumed to have been made; so, also, if a grant of an easement is actually made, that grant is void if it is opposed to the purpose of a statute, but if the grant is only partly at variance with an act of parliament it may be good, if the easement is capable of division, so far as it is not opposed to the act, and void as to the remainder, and the extent of the easement will be limited by the terms of the act. Thus, in the case of the Attorney General *v. The Corporation of Plymouth*,^c an act had been passed to empower the Corporation of Plymouth to make a watercourse between the town of Plymouth and the River Mew, for the purpose of bringing water to the town to supply ships lying in the harbor, and after the passing of the act the corporation granted to a hospital in the town one fourth part of certain mills, and of the leat and watercourse. The object of the suit was to set aside the grant and conveyance, and prevent the drawing off of the

^a *Wood v. Saunders*, 44 L. J. Ch. 514; affirmed on appeal, L. R. 10 Ch. App. 582, where a report of the case when before Hall, V. C., is given in a note.

^b 3 Taunt. at p. 30.

^c 9 Beav. 67; 15 L. J. Ch. 109.

water for the supply of the town of Plymouth. The master of the rolls thought that it might reasonably be doubted whether the corporation, having been empowered to make and being in possession of the watercourse for the special purpose mentioned in the act, could alienate any part for a different purpose; that they must be considered to have undertaken the performance of a public trust and duty; and that they could not lawfully divest themselves of any part of the means of fully performing that duty or executing that trust; that they had not any right or power to permit any of the water brought by the leat to be applied to other purposes, except so much as might remain after the purposes of the act were satisfied; and that the words of the grant "one fourth part of and in the said close, and in the leat or watercourse running, coming, and going to all the said mills," must be construed to mean one fourth part of the water which remained after satisfying the public purposes of the act of parliament; and that that was all which could pass by the grant.

It is not clear whether a limited right of this kind could be acquired by prescription, but probably it could, as a grant of such a right might after long user be presumed to have been made.

Prescription partly at variance with an act of parliament.

If an easement has been acquired by *prescription*, then, as there is no deed actually in existence, the extent of the easement and the proper mode of enjoyment must be determined by the accustomed user of the right. The determination of this is frequently a difficult thing, for the accustomed user may have been limited to one particular purpose or class of purposes, simply because the dominant owner may not have had occasion to use the easement for other purposes, or it may have varied from time to time; but the extent of the right is a question which, in every disputed case, must be determined by a jury, who must found their judgment, not entirely upon the actual user proved, but upon that user coupled with surrounding circumstances.^f

Measure of easements acquired by prescription.

^f *Cowling v. Higginson*, 4 M. & W. 245; 7 L. J. N. S. Exch. 265; *Bealey v. Shaw*, 6 East, 209; *Ballard v. Dyson*, 1 Taunt. 279; *Williams v. James*, L. R. 2 C. P. 577; 36 L. J. C. P. 256.

The existence of an easement does not confer any right on the grantee that the owner of the servient tenement should not use his land in any way which is not inconsistent with his enjoyment of the easement; neither can it prevent the landowner granting to a third person another easement or right if it does not hinder the first grantee from having the full enjoyment of his easement. This was expressed by Buller, J., in the case of *Rex v. Joliffe*,^j who, when speaking of a right of way, said: "This is not like the case of a grant of land to be used in a manner incompatible with any other mode of enjoying it; for the defendant has only the liberty of passing over this land for the purpose of carrying his coals, and cannot prevent any other person from using it; and if grass were to grow on this way the owner of the land would have a right to feed his cattle on it; the easement which the defendant has does not affect the right of the owner of the land." So, also, it was said by the lord chancellor in the case of *Dyce v. Lady James Hay*, that "neither by the law of Scotland nor of England can there be a prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected."^k

No man can impose a new restriction or burden on his neighbor by his own act, and for this reason an owner of an easement cannot, by altering his dominant tenement, increase his right.^l On this ground it was determined that a malt-house which had stood for thirty or forty years, was entitled to have sufficient light to its ancient windows only for the purpose of making malt, and that the right could not be increased by the fact of the building having been converted into a workhouse. In an ac-

^j 2 T. R. at p. 95.

^k 1 Macq. 305. The principle is the same in the case of public rights of way. *Vestry of St. Mary, Newington, v. Jacobs*, L. R. 7 Q. B. 47; 41 L. J. M. C. 72.

^l Alteration of a dominant tenement will, in some cases, cause a total loss of an easement, or a suspension of the right till the dominant tenement is restored to its original condition. See *post*, chapter V.

tion for obstruction of ancient light by the erection of a fence, the question for the jury was in that case held to be whether, if the building had still remained in the condition of a malt-house, a proper degree of light for the purpose of making malt was prevented entering the windows by reason of the fence.^m If the increased amount of light had continued to be enjoyed for twenty years, a new and increased right could doubtless have been acquired. If, however, it is manifest that it was the original intention that the easement should remain appurtenant to the dominant tenement, whatever its condition might be or become, and even though the burden on the servient tenement should be increased by alterations, the easement will become increased if alterations in the dominant tenement require such increase.ⁿ

If the owner of an easement exceeds his rightful enjoyment, or does anything which would after long user produce an increased right, the servient owner may in all cases obstruct or prevent the excessive enjoyment, or the user of the thing which would enable the dominant owner after a time to claim an increased right.¹ Thus in the case of *Greenslade v. Halliday*,^o the facts were that the plaintiff, who was owner of a meadow near a stream which flowed through the defendant's land, had been for fifty years in the habit of entering her land and penning back the water of the stream with loose stones, in order to divert a portion of the water to irrigate his meadow, and he was also accustomed, when necessary, to place a board across the stream for the same purpose, supporting it by means of the loose stones; on one occasion the plaintiff permanently fixed the board by means of two hooked stakes driven into the bed of the stream, and the defendant, conceiving that this act of the plaintiff,

Right to
obstruct
excessive
user.

^m *Martin v. Goble*, 1 Camp. 320; *Lanfranchi v. Mackenzie*, L. R. 4 Eq. 421; 36 L. J. Ch. 518; *Wood v. Saunders*, 44 L. J. Ch. 514; L. R. 10 Ch. 582.

ⁿ *United Land Co. v. Great Eastern Railway Co.* L. R. 10 Ch. App. 586; 44 L. J. Ch. 685.

¹ See *McMillan v. Cronin*, 75 N. Y. 474. *Post*, chapter IV.

^o 6 Bing. 379; 8 L. J. C. P. 124.

rendering the obstruction permanent, might establish for him a greater right than that to which he was entitled, removed the stakes and the board, telling the plaintiff he should not exercise the right until it was ascertained to what quantity of water he was entitled. It was held that the defendant had done more than she was entitled to do, that the board had been improperly fastened down with stakes, which was a new mode of fastening it, and that she might lawfully remove them, but that she had no right to remove the board. Excessive user can, of course, only be obstructed by the servient owner on his own land; he cannot enter the dominant tenement, or do anything there to prevent the user, for by so doing he would be committing a trespass, and if he has no means of obstructing the excessive user without committing a trespass, no increased right can be acquired by prescription, as no presumption of a grant can arise. If, therefore, ancient windows be increased in size or number, the servient owner may build on his own land to obstruct the increased portions or the new windows, but he cannot touch the windows themselves, and so if a mill-owner alters his mill and takes more water than he is entitled to take, the servient owner cannot touch the mill, but he must sue the owner for wrongfully diverting the water.

There are some cases in which it is impossible to obstruct the excessive user of an easement without also obstructing the rightful enjoyment, and much doubt has arisen whether the servient owner is not entitled, in such an event, to obstruct the user, both rightful and wrongful, altogether. It was at first supposed that the law would in all cases sanction total obstruction, but it has ultimately been determined that in the case of rights to light, increasing the size and number of ancient windows does not justify a servient owner in obstructing the ancient as well as the newly acquired light, even though it is impossible to obstruct the new lights alone. This subject will be more fully considered hereafter.^p

Before leaving the subject of the extent of easements and

^p See *post*, chapter IV. See *Cawkwell v. Russell*, 26 L. J. Exch. 34 (not elsewhere reported).

natural rights, some notice is required of the effect on an easement of an assignment of the dominant tenement; for questions are not at all unlikely to arise on this subject. There can be no doubt that *natural* rights, which are by law annexed to the ownership of the soil, pass to a grantee or assignee of a dominant tenement, although they are not expressly mentioned in the deed of conveyance,⁹ and if land is let to a tenant he will become entitled to all natural rights during his tenancy, although the tenancy is not created by deed, for they are incident to the possession of the land. As they are given by law and are attached to the land without grant, so they pass with the land without grant into whosoever hands it comes.

Assign-
ment of
easements.

As easements, on the contrary, can be created and granted only by deed it would seem that they cannot be assigned otherwise than by deed, and there appears to be little doubt that this as a general principle is so; but though it is possible that there may be questions on this subject, they would seem to be likely to arise only in cases of tenancies; for easements cannot be assigned separately from their dominant tenements as rights in gross, and to convey land a deed is always required, so that if the dominant tenement is conveyed by deed, the same deed will operate generally as an assignment of the easement. It has been shown, however, that when a dominant tenement is conveyed, express mention in the deed of conveyance is not essential to transfer the easement, for easements appurtenant will pass on conveyance of land by deed under the *general word* "*appurtenances*," or even though appurtenances be not mentioned.¹ In case of tenancies, however, the question is not at all unlikely to arise, for when the dominant tenement is let to a tenant without deed, say for a yearly tenancy, does the tenant become entitled to the ease-

⁹ *Canham v. Fisk*, 2 Crompt. & J. 126; 1 L. J. N. S. Exch. 61.

¹ A right of easement which has never been exercised so as to become actually appurtenant to land conveyed, and which is not essential to its use and enjoyment, will not pass by a conveyance of the land merely, "and appurtenances," but without any other words clearly including the alleged easement. *The Decorah Woolen Mill Co. v. Greer*, 49 Iowa, 490.

ment? There is some doubt on the point. *Skull v. Glenister*^r seems to be an authority that he does; but the decision in that case mainly turned upon a different point. On principle it would seem that a tenant of the dominant tenement could not become entitled to an easement unless the tenement were leased to him by deed, for though it is appurtenant to the dominant tenement, still it is an incorporeal hereditament and can only pass by grant. Other rights analogous to easements have been held incapable of demise for a term except by deed;^s and the only question is whether the fact that an easement is a right appurtenant to land which can be leased for short periods without a deed makes any difference. During the argument in *Mayfield v. Robinson*,^t when *Wood v. Leadbitter* was mentioned, it was remarked, "There the question was whether a right of way could be created by the unsealed instrument. Whether a similar right once created may be demised by such an instrument is a different point." Coleridge, J., replied, "Being an incorporeal hereditament it could not." The opinion of the Court of Exchequer in the case of *Wood v. Leadbitter*^u was also very express upon the point, and that being a leading case respecting incorporeal rights, it may be well to quote the words of the court: "That no incorporeal inheritance affecting land can either be created *or transferred* otherwise than by deed, is a proposition so well established that it would be mere pedantry to cite authorities in its support. All such inheritances are said emphatically to lie in *grant* and not in livery, and to pass by mere delivering of the deed. In all the authorities and text-books on the subject, a deed is always stated or assumed to be indispensably requisite. And although the older authorities speak of incorporeal inheritances, yet there is no doubt but that the principle does not depend on the quality of the interest granted or transferred, but on the nature of the subject-

^r 16 C. B. N. S. 81.

^s *Duke of Somerset v. Fogwell*, 5 B. & C. 875. See the judgment.

^t 7 Q. B. at p. 489.

^u 13 M. & W. 838; 14 L. J. Exch. 161. See, however, *Mitcalfe v. Westaway*, 17 C. B. N. S. 658; 34 L. J. C. P. 113.

matter: a right of common, for instance, which is a *profit à prendre*, or a right of way, which is an easement or right in nature of an easement *can no more be granted or conveyed for life or for years without a deed*, than in fee simple."

A matter of considerable importance in connection with easements, and which being somewhat akin to the mode of user of these rights may be not improperly noticed in this place, is the right of the dominant owner to repair the servient tenement, or the subject of the easement, whatever it may be, in the servient tenement. It is clear that if the dominant owner has no right to repair the servient tenement or to enter that tenement for the purpose of repairing the subject of an easement, and the servient owner will not do it, he must either commit a trespass or lose his easement. There is no doubt the law is that the dominant owner may enter the servient tenement and do the necessary repairs, and that the servient owner is under no obligation to do them.¹ This has been understood to be the law ever since the old case of *Pomfret v. Ricroft*," when Twysden, J., whose opinion was upheld in the Exchequer Chamber, said that "when the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use, as if a man gives me a license to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me." The same principle has been followed in more recent times both in cases of rights of way, public and private, and of support."

Repair of
the subject
of an ease-
ment.

¹ See *Prescott v. White*, 21 Pick. 342; *Prescott v. Williams*, 5 Met. 435; *Doane v. Badger*, 12 Mass. 69; *Jones v. Percival*, 5 Pick. 487; *McMillan v. Cronin*, 75 N. Y. 474; *Pico v. Colimas*, 32 Cal. 578.

^v 1 Wms. Saund. at p. 565, ed. 1871.

^w *Hamilton v. Vestry of St. George, Hanover Square*, L. R. 9 Q. B. 42; 43 L. J. M. C. 41; *Gerrard v. Cooke*, 2 B. & P. N. C. 109; *Colebeck v. Girdlers' Co*, 1 Q. B. D. 234; 45 L. J. Q. B. 225.

SECT. 2. — *On the Extent and Mode of User of Particular Easements.*

The foregoing remarks relative to the Extent and Mode of User of Easements apply to easements and natural rights of all kinds ; but there are principles of law which relate exclusively to particular easements, and which, from their nature, are inapplicable to easements generally. These it is purposed to consider in the present section.

AIR.

It has been shown that every landowner has a natural right to purity of air — that is, that the air which naturally flows to his land shall not be rendered impure as it passes over the soil of other persons. When this subject was considered the extent and limit of the right were necessarily noticed at the same time, and there remains nothing to add in this place : it was then shown that the right is not that the air shall always be suffered to remain in an absolutely pure state, but that the air shall not be rendered, to an important degree, less compatible with the physical comfort of human existence. It is obvious that a right that air shall in no degree be polluted, would necessarily put an end to many of the ordinary occupations of mankind, occupations which it is essential should be carried on for the common welfare of man ; each individual is, consequently, bound by law to submit to a certain amount of inconvenience, that the general good of the public may be secured.*

LIGHT.

The extent of *prescriptive* rights is always more or less difficult to determine, for it has to be determined by the accustomed user, and difficulty sometimes arises from the circumstances that the user has varied, more or less, during the prescriptive period, and that the extent and mode of the user may not have been altogether known to the servient owner ; in the case of light the servi-

* See *ante*, chapter I. p. 29.

ent owner may have known that light passing over his soil entered a particular window, but he may have been totally ignorant of the purpose for which the light was used when it entered the house, and the amount of light which is sufficient for one purpose may be wholly inadequate for another.

The general rule which may be deduced from the reported cases seems to be, that a prescriptive right to light is a right to that amount of light which has been accustomed to enter a window during the whole of the prescriptive period, irrespectively of the purposes for which it may actually have been used. In the case of *Yates v. Jack*,^v which was a suit for an

^v L. R. 1 Ch. App. 295; 35 L. J. Ch. 539. It is very difficult to state in precise terms the actual amount of light to which a right to light entitles an owner of a building, although there are various cases in which it has been attempted. Each case must undoubtedly depend to some extent upon its own facts, and no doubt before the court would interfere to prevent an obstruction, the nature of the building for which the right is claimed, and the purpose for which it is used, would be taken into consideration. The right may strictly be, as stated in the text, to have the same amount of light which has been accustomed to enter a window, regardless of the purpose for which it has been used, but the court seldom interferes unless the darkening of the windows has been such as to render the house substantially less comfortable or less suitable for the purpose for which it is used. In the case of *Kelk v. Pearson* (L. R. 6 Ch. App. 809), the opinion of James, L. J., indicated this. He said: "On the part of the plaintiff it was argued before us that this was an absolute right, — that now under the statute 2 & 3 Wm. IV. c. 71, he had an absolute and indefeasible right by way of property to the whole amount of light and air which came through the windows into his house; and that he could maintain an action at law or a suit in equity upon that absolute legal right; and the only question as to the effect or extent of his right would be with regard to the discretion of this court in considering whether it was a case for damages or to be interfered with by way of injunction. Now, I am of opinion that the statute has in no degree whatever altered the preëxisting law as to the nature and extent of this right. The nature and extent of the right before the statute was to have that amount of light through the windows of a house which was sufficient according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house; or for the beneficial use and occupation of the house if it were a warehouse, a shop, or other place of business. That was the extent of the easement, — a right to prevent your neighbor from building upon his land so as to obstruct the

injunction to restrain obstruction of light by raising the height of buildings, the plaintiffs gave evidence to prove that their warehouse would be materially darkened, and that they would not be able to carry on their business so well, especially when judging samples, as they had been accustomed: the defendant, on the other hand, gave evidence to prove that no material injury would be done to the plaintiffs, and, particularly, that there would be ample light for the business carried on by them; in fact, that the screening off of the direct rays of the sun would be a positive advantage. Lord Cranworth, L. C., in his judgment, said: "On behalf of the defendant there are a great number of witnesses merchants and vendors, engaged in business similar to that of the plaintiffs, who give it as their decided opinion that even after the erection of the proposed new buildings there will be ample light for enabling the plaintiffs to conduct their business as well as they did formerly. Some of them go so far as to say that, for the purpose of sampling, a strong direct light is not desirable, and that the erection of the new building, by screening the sun's rays, will improve the quality of the light admitted to the plaintiffs' windows. The evidence satisfies me that, for some purposes of their trade, it is necessary at times to exclude the direct rays of the sun, and that, in what is called sampling, a subdued light may be better than direct sunlight. But this is not the question. It is comparatively an easy thing to shade off a too powerful glare of sunshine, but no adequate substitute can be found for a deficient supply of daylight; and an attentive consideration of the evidence of the trade witnesses on the one side and on the other has led me to the conclusion, as did the evidence of the architects, that the erection of the new buildings will materially interfere with the quantity of light necessary or desirable for the plaintiffs in the

access of sufficient light and air to such an extent as to render the house substantially less comfortable and enjoyable." This expression of opinion that the Prescription Act had not altered the nature of the right or the principle on which it is to be determined whether the right has been infringed, was subsequently approved by Lord Selborne, L. C., in the case of *The City of London Brewery Co. v. Tennant*, L. R. 9 Ch. App. 212.

conduct of their business. I desire, however, not to be understood as saying, that the plaintiffs would have no right to an injunction unless the obstruction of light were such as to be injurious to them in the trade in which they are now engaged. The right conferred or recognized by the statute 2 & 3 Wm. IV. c. 71, is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it has been used. Therefore, even if the evidence satisfied me, which it does not, that for the purpose of their present business a strong light is not necessary, and that the plaintiffs will still have sufficient light remaining, I should not think the defendant had established his defence unless he had shown that, for whatever purpose the plaintiffs might wish to enjoy the light, there would be no material interference with it." If light has been used for an extraordinary and particular purpose for twenty years, and the person interested in obstructing the right has been fully aware of the purpose for which the light was used, a right to an extraordinary amount of light for that purpose may, possibly, be acquired by prescription.²

Questions as to the extent of rights to light which have been acquired by grant have been of rare occurrence, and there is but little authority on the subject; but it is not very easy to see why such questions should not be as frequent as those which relate to prescriptive rights, unless it is that rights to light are less frequently acquired by grant than by prescription. But, nevertheless, such questions might at any time arise, and Mellish, L. J., expressed an opinion that the nature and extent of a right to light acquired by grant, express or implied, is precisely the same as if the right were acquired by prescription.³ This no doubt is so, but to ascertain the extent of the right a different measure must necessarily be used in the two cases. The extent of a prescriptive right must be measured by the accustomed enjoyment, that is, the right is to have the same

² *Lanfranchi v. Mackenzie*, L. R. 4 Eq. 421; 36 L. J. Ch. 518. See however, the previous remarks on this case, *ante*, chapter II. p. 217.

³ *Kelk v. Pearson*, L. R. 6 Ch. App. at p. 813.

amount of light which has been in the habit of entering a window during the twenty years' prescriptive enjoyment, regardless, in ordinary cases, of the use to which the light has been put; but in a case where the right has been acquired by grant, — for instance, when a man has sold a house, reserving the adjoining land over which the light passes to the windows of the house, when there would be an implied grant of right to light, — it is obvious this measure cannot be used, for the house may not have been built for twenty years. What then in such a case is the measure of the right? It is presumed it must be the amount of light that entered the windows at the time the grant was made, or is presumed to have been made, that is, in the instance given above, at the time the owner of the house and the adjoining land sold the former, reserving the latter.

A right to light cannot be suddenly enlarged by ancient windows being increased in size or number, for no man can by any act of his own impose a new burden on his neighbor. Such an alteration may confer an increased or additional right after the lapse of twenty years, but this is in reality not an increase of the original, but an acquisition of a new right.^b The opening of new or enlargement of ancient windows is, however, no wrongful act on the part of the owner of a house, and it does not in any way affect his original right to light; ¹ but the servient owner may, in the exercise of his ordinary right to build on his own land, erect something to block up the new windows if he can do so without interfering with the ancient lights.^c That he

^b *Cooper v. Hubbuck*, 30 Beav. 160; 31 L. J. Ch. 123; *Martin v. Goble*, 1 Camp. 320; *Lanfranchi v. Mackenzie*, L. R. 4 Eq. 421; 36 L. J. Ch. 518.

¹ Thus, in the very recent case of *Barnes v. Loach*, 4 Q. B. D. 494 (1879), the owner of cottages, in the walls of which were certain windows, erected on his own land a wall outside of the original wall, with another and larger window in it, and at a different angle, but the old wall and window still remained as before; and it was held that the right of access of light to the old window was not thereby affected.

^c *Cooper v. Hubbuck*, 30 Beav. 161; 31 L. J. Ch. 123; *Tapling v. Jones*, 11 H. L. C. 290; 34 L. J. C. P. 342.

may not, while blocking up the new windows, obstruct the ancient lights, even though it is impossible to block up the one without interfering with the other, will be shown hereafter.^d

Although no new or additional right to light can be acquired by increasing the size or number of windows, the owner of ancient windows may alter and improve their condition in any way he pleases in order to make them admit a greater amount of light through the ancient apertures, and he will be entitled to the light so acquired. It was held in an old case at *nisi prius* that if partial light only has been accustomed to enter ancient windows by reason of blinds sloping upwards in front of the windows, that the measure of the right to light is the quantity of light which has been accustomed to enter the windows when so blinded, and that on removal of the blinds the servient owner would be justified in obstructing the additional amount of light thereby acquired;^e but the more modern case of *Turner v. Spooner*^f has established a different rule. In that case the plaintiff was possessed of two ancient windows, one of which had always been painted white on the inside, and was protected with iron bars, and both the windows were made with heavy frames and small casements in leaden lattices, and they only opened partially. The plaintiff, to improve his windows, removed the heavy frames and casements, and inserted plate glass in light frames, making the windows to open wide. The defendants thereupon erected a wooden frame in their yard within a few inches of the ancient lights, resembling windows, and glazed with opaque dark-colored glass, and thereby prevented the additional light which had been acquired entering the windows. A bill was filed by the plaintiff to restrain the erection of the glazed frame. The defendants contended that they were entitled to cut down the amount of light enjoyed through the altered windows to the amount admitted through the old casements; but the vice

Altering
and im-
proving the
condition
of windows.

^d See *post*, chapter IV.

^e *Cotterell v. Griffiths*, 4 Esp. 69.

^f 1 Dr. & Sm. 467; 30 L. J. Ch. 801.

chancellor would not agree to that proposition, for, said he, if a person possesses ancient lights, and without altering them can acquire an increased degree of light and air, he is entitled to such acquirement, without giving a right to the occupier of the servient tenement to say that that is a new easement; and it appeared to him that with respect to the alteration of the wood or framework, or the mode of glazing, or the thickness of the bars, as distinguished from the aperture itself, it was competent for the plaintiff to make any such alterations without its being said that he was doing that which might result in the acquisition of a new easement.

The fact that in America a right to light is not acquired either by prescription or by implied grant, as already shown,¹ and that rights of light are seldom *expressly* granted in our conveyances, renders any further examination of this particular section unimportant to the American reader.

The case of *Janes v. Jenkins*² does fully adopt the English rule; but the deed of the land conveyed in that case also included "all privileges, appurtenances, and *advantages to the same* belonging, or in any wise appertaining."

SUPPORT.

But few remarks are required relative to the extent of the natural right to support, which has been explained to be the right to which landowners are by law entitled that the use and enjoyment of their land in its natural condition shall not be disturbed by removal of the adjacent and subjacent means of support. But it should not be forgotten that this natural right of support from a neighbor's land is limited to one's own *land*, and does not extend to any buildings or improvements, such as fences, trees, or shrubbery which he has placed upon his land, and consequently he has no remedy for the loss of such improvements if his land should subside through an adjoining owner's excavations, which were made *without negligence* on his part.³

¹ *Ante*, p. 202.

² 34 Md. 1 (1870).

³ See the interesting case of *Gilmore v. Driscoll*, 122 Mass. 199, in which

This right is absolute and unlimited, and if the means of support is removed, and no other support supplied, whereby the land is made to sink, the person removing the same is responsible for damage caused ; and this is the case even though the removal was effected with the utmost care, and although minerals have been excavated according to the custom of the country where mines are situate. The subject was fully examined and discussed in the case of *Humphries v. Brogden*,^o in which, in addition to laying down the above-mentioned rule of law, the court said : “ We likewise think that the rule giving the right of support to the surface upon the minerals in the absence of any express grant, reservation or covenant, must be laid down generally, without reference to the nature of the strata or the difficulty of propping up the surface, or the comparative value of the surface and the minerals. We are not aware of any principle upon which qualifications could be added to the rule, and the attempt to introduce them would lead to uncertainty and litigation.” . . . “ Something has been said of a right of reasonable support for the surface, but we cannot measure out degrees to which the right may extend, and the only reasonable support is that which will support the surface from subsidence and keep it securely at its ancient and natural level.” These principles being established as law, an important question arises in cases where the soil is of such a nature that it is impossible to excavate any of the minerals without causing a subsidence of the surface. When the soil is of that nature and the surface belongs to one person and the subjacent minerals to another, whose interest is to be sacrificed ? Is the mine-owner to forbear excavating his minerals, or must the surface-owner submit to unavoidable damage ? It has been held that in such an event the mine-owner must refrain from excavating any of his minerals,

a masterly judgment was given by Gray, C. J. See *ante*, p. 38; and *post*, chapter IV. title SUPPORT.

^o 12 Q. B. 739 ; 20 L. J. Q. B. 10 ; *Rowbotham v. Wilson*, 6 E. & B. 593 ; 25 L. J. Q. B. 362 ; in House of Lords, 8 H. L. C. 348 ; 30 L. J. Q. B. 49.

and that he is not in any case, except by special agreement, justified in causing the surface-owner any damage.^h

The strict legal right to unlimited support may, of course, be modified, as it frequently is, by act of parliament, or by private agreement.ⁱ A grant of land, however, with a reservation of the subjacent mines, or with a reservation of the mines with power for the owner to dig and get the minerals, paying for all damage caused by the digging, does not generally deprive the surface-owner of his right to support,¹ but whether he is so deprived or not depends in each case upon the terms of the grant.^j And the same is true as to *lateral* support. Thus, if land be sold to a railroad company expressly "for materials" for building their road, it has been thought that an implied right to excavate exists in the grantee, and the company is not liable to the grantor for want of support to his other adjacent land.²

If the natural right to support for land is limited by act of parliament or otherwise, and the owner of subjacent mines is entitled to excavate and cause subsidence of the surface, a similarly limited right to support can alone be acquired by prescription for houses erected on the surface.

In speaking of easements generally, it was shown that the dominant owner has a right to enter the servient tenement for the purpose of doing any repairs either

^h *Wakefield v. The Duke of Buccleuch*, L. R. 4 Eq. 613; 36 L. J. Ch. 763.

ⁱ *Smith v. Darby*, L. R. 7 Q. B. 716; 42 L. J. Q. B. 140; *Eadon v. Jeffcock*, L. R. 7 Exch. 379; 42 L. J. Exch. 36; *Aspden v. Seddon*, L. R. 10 Ch. App. 394; 44 L. J. Ch. 359.

¹ See *ante*; *Marvin v. Brewster Iron Min. Co.* 55 N. Y. 538; *Ryckman v. Gillis*, 57 Ib. 68.

^j *Smart v. Morton*, 5 E. & B. 30; 24 L. J. Q. B. 261; *Harris v. Ryding*, 5 M. & W. 60; 8 L. J. N. S. Exch. 181; *Roberts v. Haines*, 6 E. & B. 643; 25 L. J. Q. B. 353; in *Exchequer Chamber*, 7 E. & B. 625; 27 L. J. Exch. 49; *Aspden v. Seddon*, 1 Exch. D. 496.

² *Ludlow v. Hudson River Railroad Co.* 4 Hun, 239; 6 Lans. 128.

^k *Rowbotham v. Wilson*, 6 E. & B. 593; 25 L. J. Q. B. 362.

to it or to the subject of the easement therein that ^{supporting building.} may be required for the maintenance of his enjoyment. It is unnecessary in this place again to discuss this subject at length, but it is to be remarked that the question of the right lately arose with reference to the easement of support for one building from another. The question in the case had reference to a *party wall*, and it was argued that, under the circumstances of the case, a covenant to repair the wall by the grantor of the lease of the dominant tenement must be implied; the decision of the court, however, was against any implication of such a covenant, and it was said that it might be open to doubt whether the support of the plaintiff's house by the party wall was, strictly speaking, in the nature of an easement or not, but assuming that the right of support in that case was in the nature of an easement founded on implied grant, it was well established that there is no obligation to repair on the part of the owner of the servient tenement, but the owner of the dominant tenement must repair, and he may enter on the land of the owner of the servient tenement for that purpose.¹

And this right to enter and repair extends also, if need be, to taking down the whole party wall, and rebuilding the same, as before, without being liable to the other for any temporary loss of the use of the servient tenement, while such repairs are going on.¹

¹ *Colebeck v. Girdlers Co.* 1 Q. B. D. 234; 45 L. J. Q. B. 225. It was assumed in the remarks of court above noticed that there was a right to support for the plaintiff's house by the wall; but it must be remembered that it has been held that no right to support for one building from another can be acquired by prescription. (*Ante*, chapter II. sec. 2, SUPPORT.)

¹ *Partridge v. Gilbert*, 3 Duer, 184; 15 N. Y. 601. And see *Campbell v. Mesier*, 4 John. Ch. 334. The full discussion of the law of party walls is foreign to the scope of this treatise; but the learned reader is referred to a valuable note to *Block v. Isham*, 16 Am. Law Reg. 10, by Hon. James T. Mitchell, of Philadelphia.

WATER.

The natural rights which riparian proprietors have in the water of natural streams are to a certain extent conflicting in their character, for while all have a right to the uninterrupted flow of that water, all have a right to use and consume it as it flows past their land, and the result is that these rights are limited by each other; the right to the uninterrupted flow of water is not a right that the water shall be absolutely and wholly uninterrupted, but that the water shall not be materially diminished in quantity by user by other riparian proprietors; and, in a similar manner, the right of the latter is not that they may use the whole or even a considerable portion of the water, but only that they may make a reasonable use of it on their riparian land, having due regard to the interests of other persons who have land lower down the stream.^m

And conversely a person has not a natural right to convey into a stream an unreasonable amount of water, — ten million gallons every day, — and a riparian proprietor below may have an injunction against such a use of the stream.¹

The right to use the water of streams is generally said to be a right to a *reasonable* use of the water, for it is impossible to lay down any hard line to define the extent of this right, but the very use of this word “reasonable” has given rise to questions as to what amount of user can be so described. In the case of *The Medway Navigation Company v. The Earl of Romney*,ⁿ it was held that the abstraction of water from a flowing stream to supply a gaol or lunatic asylum were purposes more extensive than those to which a riparian owner has a right to apply the water; and in the case of *The Wilts and Berks Canal Navigation Company v. The Swindon Waterworks Company*,^o James, L. J., in giv-

^m *Embrey v. Owen*, 6 Exch. 353; 20 L. J. Exch. 212; *Wright v. Howard*, 1 Sim. & St. 190; 1 L. J. Ch. 94.

¹ *Mayor of Baltimore v. Appold*, 42 Md. 442.

ⁿ 9 C. B. N. S. 575; 30 L. J. C. P. 236.

^o L. R. 9 Ch. App. 451; 43 L. J. Ch. 393; in H. L. L. R. 7 H. L. 697; 45 L. J. Ch. 638.

ing judgment, said that the use and diversion of a stream to supply a town with water is not a purpose for which a riparian proprietor is entitled to take the water from its natural course. On the other hand, Parke, B., observed, in the case of *Embrey v. Owen*, one's common sense would be shocked by supposing that a riparian owner could not dip a watering pot into a stream in order to water his garden, or allow his family or cattle to drink ; and, he added, that it is entirely a question of degree, and that it is very difficult, and indeed impossible, to define the precise limits of the right, and separate the reasonable and permitted use of a stream from its wrongful application. So in the recent case of *Earl of Sandwich v. Great Northern Railway Co.*,¹ it was held that a railway company who are riparian proprietors are entitled to abstract from the stream a reasonable supply of water for their locomotive engines and their station, even though it might so reduce the quantity of water as to stop a mill on the river for a few minutes every day. In the case of *Miner v. Gilmour*,² which was an appeal to the Privy Council from Lower Canada, Lord Kingsdown, who said that in this particular there was no material distinction between the French law prevailing in Lower Canada and the English law, stated the law in these terms, — and it is worthy of notice that his lordship made a distinction between the ordinary and the extraordinary use of water, a distinction which has not been generally taken, but which is very important, having regard to the exercise of the right : “ By the general law applicable to running streams every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land, — for instance, to the reasonable use of the water for his domestic purposes and for his cattle, — and this without regard to the effect which such use may have in

Ordinary
and ex-
traordi-
nary use.

¹ 10 Ch. D. 707; 27 Weekly Rep. 16 (1879). It has ever been asserted that one riparian proprietor may lawfully apply *all the water* of a small stream, if necessary, for such ordinary purpose as supplying water for his cattle or household purposes. See *Tolle v. Correth*, 31 Tex. 362; *Rhodes v. Whitehead*, 27 Tex. 310; *Stein v. Burden*, 29 Ala. 132.

² 12 Moore P. C. at p. 156.

case of a deficiency upon proprietors lower down the stream. But further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury." It must, however, always be borne in mind that the natural right to take water from streams extends only to taking it for purposes of utility, and for purposes beneficial to the riparian estate.²

The question has often arisen in the American courts, how far a riparian proprietor has a right to take ice from natural or artificial ponds on his lands, to sell as an article of merchandise, and thus diminish the quantity of water which, sooner or later, might reach the owner below. The question was much discussed in *Cummings v. Barrett*,¹ on an application by a lower proprietor, a mill-owner, for an injunction to restrain the upper proprietor from cutting ice for that purpose. The injunction was refused until the rights of the parties could be determined in a suit at law; Shaw, C. J., saying, "It is quite doubtful, considering the complainants' claim as a claim for actual and substantial damage done to their mills, whether the cutting and carrying away of the ice mentioned, or of any quantity of ice, would diminish the volume of water which would come to the complainants' mills, and of which they could avail themselves for driving their mills. Ice must be cut in winter. It usually melts in the latter part of winter, or early part of spring, together with the ice and snows of the surrounding country, and these, together with the rains which cause and promote them, constitute what is usually called the spring floods, which commonly cause a great surplus of water in similar mill streams, not

² Lord Norbury *v. Kitchin*, 3 F. & F. 292.

¹ 10 Cush. 186 (1852).

only not available to any useful purpose, to mills, but often injurious.

“And it may well be doubted after any quantity of ice cut from such a pond, whether after the spring floods have subsided, and the useless surplus of water passed away, and long before the approach of any “dry season,” the water in the pond would not be as full and copious for all mill purposes as if no ice had been so cut. But whether so or not, it would involve a very nice question of fact, to be tried under all the advantages which the testimony of science and experience could afford in a suit at law where the right depending both on the fact and the law would be directly in issue.”

Since that time the weight of authority seems to be that the owner of the bed of a stream or pond ordinarily has a right to cut and remove ice therefrom; subject to the same principles of a reasonable use as in abstracting water.¹

Whether a riparian owner may use the water of a natural stream to irrigate his land depends upon the quantity of water

¹ *State v. Pottmeyer*, 33 Ind. 402; 30 Ind. 287; *Paine v. Woods*, 108 Mass. 173; *Edgerton v. Huff*, 26 Ind. 35, ice taken from a canal; *Myer v. Whitaker*, 55 How. Pr. R. 376, disapproving of *Marshall v. Peters*, 12 Ib. 218. In *Mill River Woolen Co. v. Smith*, 34 Conn. 462, it was held that when a mill-owner lawfully flowed the land of another, under a statutory right to do so, the ice formed in such pond belonged to the mill-owner, and not to the riparian proprietor; but this is directly opposed to *Paine v. Woods*, 108 Mass. 173, where it was held that the landowner could lawfully take and carry away the ice for use or sale, provided he did not thereby appreciably diminish the head of water at the dam of the mill-owner. In Massachusetts, by force of an early ordinance of 1641-47, great ponds, containing more than ten acres, were made public, to lie in common for public use, and therefore the public have a right to cut and carry away ice from such ponds, and the riparian proprietors have no right of action for so doing. *West Roxbury v. Stoddard*, 7 Allen, 158; *Paine v. Woods*, 108 Mass. 169; *Commonwealth v. Vincent*, Ib. 444; *Fay v. Salem and Danvers Aqueduct Co.* 111 Mass. 27; *Hittinger v. Eames*, 121 Mass. 546. And even without such an ordinance, a person may acquire a right to ice in a public navigable stream, by taking possession, marking and staking it off, and expending labor upon it to prepare it for cutting, so that he may maintain an action against a wrongdoer for taking it away. *Hickey v. Hazard*, 3 Mo. App. 480.

he requires and the injury he would inflict upon other riparian owners. In *Wood v. Waud*,^r Pollock, C. B.,
 Riparian right to irrigate land. observed that in England, it is not very clear that user for this purpose would be permitted to the same extent as it is allowed in France and America; while Cresswell, J., in *Sampson v. Hoddinott*,^s said, that irrigation is a riparian right to be exercised subject to the rights of other riparian proprietors. In *Embrey v. Owen*,^t the court said that user for irrigation would not in every case be a lawful enjoyment of water, even if the water were again returned to the river after being diverted on to land with no other diminution than that which was caused by absorption; that this must depend upon the circumstances of each case, for on the one hand it could not be permitted that the owner of a tract of many thousand acres of porous soil abutting on one part of a stream could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, although there were no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for the purpose; but that, on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into a stream in order to water his garden. It is thus, the court added, entirely a question of degree; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not; and in the case before the court the judges said they thought that as the irrigation took place not continuously, but only at intermediate periods when the river was full, and no damage was done thereby to the working of the mill, and the diminution of water was not perceptible to the eye, it was such a reasonable use of the water as not to be prohibited by law.

^r 3 Exch. 748; 18 L. J. Exch. 305.

^s 1 C. B. N. S. at p. 603; *Miner v. Gilmour*, 12 Moore, P. C. per Lord Kingsdown, at p. 156.

^t 6 Exch. 353; 20 L. J. Exch. 212.

IN AMERICA,

the right to divert water for the purpose of irrigation, whether by dipping it up or making sluices or ditches in one's land, is clearly recognized, being subject always to the same rules as other uses, viz., it must be a *reasonable* diversion, in quantity and manner.¹ This question of reasonableness must depend upon all the circumstances of each particular case, and seems, therefore, to be always a question for the jury, under the instruction of the court. And if the right be exercised in an unreasonable manner, either as to amount diverted, or the time of year the diversion takes place, the party is liable.² One element of reasonableness might be the great injury to the owner below, as compared with the small benefit to the owner above so diverting it. And it seems that some actual damage to the proprietor below is necessary in order to give a cause of action for a diversion of part of a watercourse,³ though for a diversion of an unreasonably large part of a stream, and not returning any of it into the channel again, an action might lie without proof of special damage.⁴

Irrigation
in Amer-
ica.

User of the water of a stream for manufacturing purposes is a riparian right if the quantity and purity of the water is

¹ See *Perkins v. Dow*, 1 Root, 535; *Weston v. Alden*, 8 Mass. 136; *Blanchard v. Baker*, 8 Me. at p. 266; *Tolle v. Correth*, 31 Tex. 362; *Elliot v. Fitchburg Railroad Co.* 10 Cush. at p. 194. And see *Pitts v. Lancaster Mills*, 13 Met. 156; *Thurber v. Marten*, 2 Gray, 394, a valuable case; *Haskins v. Haskins*, 9 Gray, 390; *Springfield v. Harris*, 4 Allen, 494.

² See *Colburn v. Richards*, 13 Mass. 420; *Anthony v. Lapham*, 5 Pick. 175; *Parker v. Griswold*, 17 Conn. 288; *Union Mills v. Ferris*, 2 Sawyer, C. C. 176; *Miller v. Miller*, 9 Penn. St. 74; *Crooker v. Bragg*, 10 Wend. 264; *Gillett v. Johnson*, 30 Conn. 180, an interesting case on this point; *Cook v. Hull*, 3 Pick. 269; *Newhall v. Ireson*, 8 Cush. 595; *Chandler v. Howland*, 7 Gray, 348; *Wadsworth v. Tillotson*, 15 Conn. 366; *Evans v. Merriweather*, 3 Scam. 496, where the subject is carefully considered.

³ See *Elliot v. Fitchburg Railroad Co.* 10 Cush. 191, where the subject is elaborately considered by Shaw, C. J. And see *Van Hoesen v. Coventry*, 10 Barb. 518; *Ferrea v. Knipe*, 28 Cal. 341.

⁴ See *Newhall v. Ireson*, 8 Cush. 595; *Stowell v. Lincoln*, 11 Gray, 434.

not altered to a sensible degree to the prejudice of other riparian proprietors. During the argument of *Embrey v. Owen*, Alderson, B., mentioned a case which had been tried before him, in which it appeared that water was taken from a river to work a steam engine; that there was an artificial channel from the river to a reservoir in the yard belonging to a mill, and the water was there mixed with other water obtained from the earth; the whole was then used for the steam engine, and all that was not consumed was transferred back to the river. The question was, whether that mode of user produced actionable injury to some other mills lower down the stream. The learned judge said he left it to the jury to say whether the same quantity of water continued to run to the river as if none of the water had entered the premises of the defendant, telling them that if they were of that opinion they should find a verdict for the defendant."

It has already been stated that the extent of prescriptive rights must be measured and determined by the accustomed user; if, therefore, a part of the water of a stream has been for so long a time diverted to a mill that the mill-owner has acquired a prescriptive title to divert it, his right is limited to the diversion of that *quantity* of water which he has been accustomed to divert, and he cannot, by altering his machinery, suddenly acquire a more extensive right."

Where a right to flow another's land by a watercourse is acquired solely by prescription, all agree upon the rule — as an abstract rule — that the extent of the right is to be measured entirely by the mode and extent of the use,¹ but all are not so well agreed upon the

" *Dakin v. Cornish*, mentioned by Alderson, B., 6 Exch. at p. 360. See, also, *Wood v. Waud*, 3 Exch. 748; 18 L. J. Exch. 305.

" *Bealey v. Shaw*, 6 East, 209; *Brown v. Best*, 1 Wils. K. B. 174.

¹ See instances in *Cotton v. Pocasset Man. Co.* 13 Met. 429; *Stein v. Burdon*, 24 Ala. 130; *Darlington v. Painter*, 7 Penn. St. 473; *Hall v. Augsburg*, 46 N. Y. 622; *McNab v. Adamson*, 6 Up. Can. Q. B. 100; 8 Ib. 119; *Buell v. Read*, 5 Ib. 546; *McKechnie v. McKeyes*, 10 Ib. 37; *Odiorne v. Lyford*, 9 N. H. 502; *Burnham v. Kempton*, 44 N. H. 78.

practical application of the rule to a given state of facts. For instance, a mill-owner has maintained a dam, of a fixed and definite height for more than twenty years, which when full will flow to a certain known height on the land of owners above. Now all agree that he cannot, under his prescriptive right, *raise his dam* so as to flow higher than before.¹ But suppose, instead of increasing the height of the structure of his dam, he repairs it, tightens the leaks, closes more constantly his gates and wasteways, introduces new and improved machinery, requiring less water than before, by all of which means he not only raises the water higher than he actually did in the former condition of his dam, but also keeps the water more constantly at or near the highest point than was practicable under the former circumstances. What is now the measure and extent of his prescriptive right; that height to which he did actually maintain the water, for twenty years, or that to which he *could have done*, with a dam no *higher* than he always kept, had he always used the modern improvements now introduced?

There is a difference of opinion upon that question. In *Cowell v. Thayer*² the Supreme Court of Massachusetts, in a carefully considered case, held that the prescriptive right extended to all that his dam *was capable* of flowing without raising its structure; even though it occasioned much more damage to the landowner above than ever before. And Shaw, C. J., thus vindicated the judgment there arrived at: "It is contended on the part of the landowner, that as the actual use of the water at a given height, by the mill-owner, and the acquiescence in such use, by the landowner, is the foundation and proof, so it must also be the measure and limit of his right. This, to some extent, is true; and where there is a definite limitation or modification of the use,—one that is practicable and measurable,—it will show a corresponding modification of the right. As where, for example, according

¹ *Baldwin v. Calkins*, 10 Wend. 167; *Whittier v. Cochecho Man. Co.* 9 N. H. 454; *Wright v. Moore*, 38 Ala. 598; *Gerenger v. Summers*, 2 Ired. 229; *Russell v. Scott*, 9 Cow. 279.

² 5 Met. 253.

to the custom of the country, a saw-mill, or other mill, has been kept up in the winter only, and the mill-owner has uniformly been accustomed to draw off the water sufficiently early in the spring to allow the growth of a crop of grass, and to continue it down, until the hay is cut and got in, it must be regarded as establishing a right to a winter privilege only, and not a constant privilege; and then, flowing the land through the year must be considered as a new use, not within the mill-owner's prescriptive right.

“So, where a dam had been kept up more than twenty years, but the water had been drawn down six weeks in each year, between June and October, to enable the landowners to get clay, it was considered good evidence of a right to keep up the dam, subject to such limitation. *Bolivar Manuf. Co. v. Neponset Manuf. Co.* 16 Pick. 241. Other cases may easily be imagined, where a prescriptive right, proved by use and enjoyment, may be limited and qualified by a definite interruption in the constancy of such use, for a certain time or purpose, in favor of the person against whom the right is claimed. But in determining the legal rights of parties, the law looks rather to practical than theoretical distinctions, and seeks, as far as possible, to place them upon grounds permanent and general, and upon principles applicable to the generality of cases, not shifting and varying with a slight change of circumstances. The right, when once established, shall be construed favorably to the party acquiring it. Conformably to these rules, it has long been held that where one has acquired a right to raise and maintain a head of water, by using it for one purpose, he may apply it to another; he may substitute a cotton factory for a saw-mill, and the like; and this upon the ground that any other rule would put a stop to all improvements. *Cottel v. Luttrell*, 4 Co. 87; *Saunders v. Newman*, 1 B. & Ald. 258; *Biglow v. Battle*, 15 Mass. 313; *Johnson v. Rand*, 6 N. H. 22. It comes, we think, within the spirit of the same rule, to hold that when a man has, by his dam, raised a certain head of water, and maintained such dam long enough to raise the presumption of a grant, he may not only use his head of water for another purpose or branch

of business, but he may repair his dam, and make it tighter ; he may use improved machinery, taking the water from the top instead of the bottom of the flume ; and generally, he may use the water more economically, although the effect may be to keep the water more constantly at the upper level. *Alder v. Savill*, 5 Taunt. 454.

“ As a general rule, the height to which such a mill-owner will have a prescriptive right to maintain the water will depend upon the height of the dam by which he has raised it. In speaking of the height of the dam, we mean it to be understood as the efficient height of the dam ; the height to which such dam, when completed and finished, with its rolling dam, waste ways, &c., and in good repair and condition, will raise the head of water. Parts of the dam of earth, or other materials, may be raised higher than it is ever intended to raise the water by such dam. This is not intended ; but, as already explained, the efficient height.

“ On the whole, we think the true rule is this : that when one has acquired a prescriptive right to a constant mill privilege, by keeping up and using a dam more than twenty years, which dam, in its usual operation, would raise the water to a given height, and has used it, at his own pleasure, at that height, without any claim of right on the part of any other person to have it drawn or kept down for any part of the year, or upon any definite occasion, he has a right to retain it at the same height, although from the former leaky condition of the dam, the rude construction of the machinery, or the lavish use and waste of the stream, the water has not in fact been constantly or usually kept up to that height. If, therefore, he repairs the dam, without so changing it as to raise the water higher than the old dam, when tight and in repair, would raise it, or uses it in a different mode, and thereby keeps up the water more constantly than before, it is not a new use of the stream, for which an adjacent owner can claim damages, but a use conformable to his prescriptive right.”

The same question, or a very similar one, subsequently arose

in the same court, in *Ray v. Fletcher*,¹ in which it appeared that during the time complained of the water raised by the defendant's dam "flowed higher, and covered more of the plaintiff's land than it had ever done before, and that the water remained upon the plaintiff's land, at seasons of the year, when it never did before;" but it did not appear that the defendant's dam had been actually raised within twenty years last past; and the court held that the defendant had a right, during the time of the alleged injury, to keep up and maintain a dam of the same height as that which he had kept up and maintained for twenty years before the commencement of the injury complained of, although the water was thereby kept up more uniformly, and flooded to a greater height than by the former dam, and although the land of the plaintiff was flooded for a longer period of the year than before. This decision was held to be substantially in conformity with the rule laid down in *Cowell v. Thayer*; although it was said that case might require some slight modification in particular expressions, to avoid being misunderstood. "It is not," say the court, "the actual height of the dam which will regulate the prescriptive right of the party holding it, but its *efficient height*, according to its structure and operation, to maintain the height of the water, when in repair, and in good order; and although the water actually raised by it may to some extent vary from one season, or one year, to another, owing to the tightness of the dam, the mode of using the water, the different seasons as being dry or wet, and the like, yet these considerations are too variable and uncertain to be adopted and relied upon as the basis of a right acquired by prescription. We think, therefore, the efficient height of the dam, in its ordinary action and operation, measures and limits the claim of the mill-owner to raise and appropriate the mill power of the stream; and the adverse, continued, peaceable, and uninterrupted use and enjoyment of the privilege, according to such claim, is evidence of the acquiescence of all

¹ 12 Cush. 200. And see *Jackson v. Harrington*, 2 Allen, 242; *Morse v. Marshall*, 13 Allen, 288; *Short v. Woodward*, 13 Gray, 86; *Winnipeg Lake Co. v. Young*, 40 N. H. 420.

other riparian proprietors, who would have a right to question and contest such claim, and, therefore, constitute that right by prescription, which would be the result of a grant from all such other proprietors on the stream.”¹ The same view has also been taken in other courts.² On the other hand, an opposite view was taken in *Carlisle v. Cooper*,³ and very strong reasons are there advanced in its support. And similar views prevail in some other states,⁴ the point of difference between the cases being whether the efficient height and capacity of *the dam* shall be the test, or the actual height and condition of *the water* for twenty years. Convenience and simplicity point to the former; the analogies of the law are claimed to indicate the latter. The precise point may not be considered as yet settled.

As the accustomed user is the proper measure of a prescriptive right, a difficulty, to which allusion has already been made, occurs when the user has been varying in extent. A right to pollute water may be acquired by prescription, but if from the increase of a manu-
Measure of prescriptive right to pollute a stream.
factory, or a town, the quantity of foul matter cast into a stream has gradually increased, a question arises as to the extent of the pollutor's right, if the user has been such as to confer any right upon him at all; the question is whether the

¹ This case, as well as *Cowell v. Thayer*, were complaints under the mill acts for flowage, but the defence of prescription set up in them was decided solely upon common law principles, irrespective of the form of the remedy, and the suggestion to the contrary in *Carlisle v. Cooper*, 4 C. E. Green, 261, is apparently erroneous.

² *Hynds v. Shults*, 39 Barb. 600; *Baker v. McGuire*, 53 Geo. 245. As to the use of “flash boards,” see *Marcy v. Shults*, 29 N. Y. 354; *Grigsby v. Clear Lake Co.* 40 Cal. 407.

³ 4 C. E. Green, 256; 6 Ib. 578; affirmed in *Horner v. Stillwell*, 35 N. J. Law, 307 (1871).

⁴ See *Griffin v. Bartlett*, 55 N. H. 123; *Town v. Faulkner*, 56 N. H. 261; *Burnham v. Kempton*, 44 N. H. 90; *Custice v. Thompson*, 19 N. H. 471; *Smith v. Russ*, 17 Wis. 227; *Mertz v. Dorney*, 25 Penn. St. 519; *Sabine v. Johnson*, 35 Wis. 185, in which *Lyon, J.*, says that *Cowell v. Thayer* is “in conflict with nearly all of the adjudged cases on this subject;” *Gilford v. Lake Co.* 52 N. H. 266; *Stiles v. Hooker*, 7 Cow. 266. See *Lacy v. Arnett*, 33 Penn. St. 169.

extent of the user at its first commencement, or the extent of the user twenty years before the commencement of any action or suit in which the right is brought in question, is the measure of his right; for it clearly cannot be the extent of the user at any more recent period. If it is the extent of the user at its first commencement, the right in many cases will be no right at all, for it frequently happens that the pollution at first is imperceptible, but if the extent of the user twenty years before any action or suit is to be taken as the measure of the right, it is difficult to see how any grant can be presumed to have been made precisely at that time, for, as it is uncertain at what time an action will be commenced, it would be necessary to presume a constant succession of grants perpetually increasing the right, one of which happened to be twenty years before action. In the case of *Crossley & Sons (Limited) v. Lightowler*,^w Lord Chelmsford, L. C., decided that a prescriptive right having been acquired to pour foul water into a stream, and the fouling having been increased by the erection of new factories in the place of those to which the right was attached, "the user which originated the right must also be its measure, and it cannot be enlarged to the prejudice of any other person." It will, however, be remembered, that in the case of *Goldsmid v. The Tunbridge Wells Improvement Commissioners*,^x the master of the rolls expressed his opinion that, "when the pollution is increasing, and gradually increasing from time to time, by the additional quantity of sewage poured into it, the persons who allow the polluted matter to flow into the stream are not at liberty to claim any right or prescription." From these authorities, therefore, it would seem that if the pollution at its commencement was defined in amount, and originated from a cause certain, as the erection and use of a factory, a prescriptive right may be acquired, and the measure of the right will be the extent of pollution at the commencement of the user, but that if

^w L. R. 2 Ch. App. 478; 36 L. J. Ch. 584.

^x L. R. 1 Eq. 161; 35 L. J. Ch. 88; on appeal, L. R. 1 Ch. App. 349; 35 L. J. Ch. 382. See *ante*, chapter II. p. 259.

there has been no defined commencement no right can be gained, as no grant can be presumed.¹

When a right to pollute a stream has been acquired it is a right, in ordinary cases, and unless the contrary can be shown, not merely to pollute the water in a particular manner, but to pollute it to the particular extent in that or any similar manner. In *Baxendale v. McMurray*² the question was whether the owner of a paper mill, who had been accustomed to pollute a stream by pouring in refuse liquor after making paper from rags, was entitled to pour in similar filth after making paper by a new process from Esparto grass. Lord Cairns, L. J., thought the question was rather one of fact for a jury than one of law, for it was what was the right or easement of the defendant, the mill-owner? Was it a right, specific and defined, to pollute the stream by discharging the dirty water in which rags have been washed, or was it a right to discharge into the river the refuse liquor and foul washings produced by the manufacture at the mills of paper in the reasonable and proper course of such manufacture, using the materials which are proper for the purpose, but not increasing, as against the servient tenement, to any substantial or tangible degree, the amount of pollution? It was the opinion of the lord justice, that upon the facts before the court a jury would have found that the latter, and not that the former, was the right, for that it was difficult to suppose the existence of an easement founded on, and limited to, the washing of rags.

It has been shown that if the owner of an easement exceeds his rightful enjoyment, or does anything which would after long user produce an increased right or easement, the servient owner may obstruct the user which is excessive, but that if it is impossible to obstruct the excessive user alone without at the same time stopping that which is rightful, it is a matter of some doubt whether he is entitled to obstruct the rightful as well as the

Pollution
by particu-
lar means.

Pouring
dirty water
over land
in excess
of right.

¹ See the late important case of *Prentice v. Geiger*, 74 N. Y. 341; *Gladfelter v. Walker*, 40 Md. 1; *Thomas v. Brackney*, 17 Barb. 654.

² L. R. 2 Ch. App. 790.

excessive user, or whether he must submit to the increased burden upon his estate. The rule in the case of enlarged windows has been referred to, but if the easement is a right to pour clear water over land, and the owner of the easement, in excess of his right, pours dirty with clear water, it has been held that the servient owner may obstruct the enjoyment of the easement altogether, for he could not obstruct the dirty water alone. Alderson, B., puts the right of total obstruction on the ground that "if a man has a right to send clean water through my drain and chooses to send dirty water, every particle of the water ought to be stopped, because it is all dirty."²

Riparian rights are rights which the law gives to owners of land abutting on a natural stream, for the beneficial occupation of that land; they are derived from, and are incident to, the possession of that land; if, therefore, a riparian owner grants away a part of his land which does not abut on the stream, its character of riparian land is destroyed, and the grantee does not become entitled to riparian rights.^a In the case of *Nuttall v. Bracewell*,^b however, the majority of the judges expressed an opinion that a riparian proprietor has power to assign his riparian rights to a stranger, but Pollock, C. B., and Chan-

Partition
of riparian
land.

Assign-
ment of
riparian
rights.

² *Cawkwell v. Russell*, 26 L. J. Exch. 34 (not elsewhere reported). In his judgment in this case, Pollock, C. B., said: "Where a party has a limited right of this kind, and exercises that limited right in excess, so as to produce a nuisance, the only remedy, and the only way whereby the party can protect himself, is by stopping the whole, as was done in a case (*Renshaw v. Bean*, 18 Q. B. 112; 16 L. J. Q. B. 219) deciding (though it is hardly necessary to cite a decision on the point, it is so very clear and plain on the good sense of the matter that it hardly wants an authority), that if a man has a limited right to the use of a window, and he enlarges it considerably, the only way in which the person who is annoyed by the enlargement of the window can prevent that nuisance is by erecting a barrier and stopping the whole up." This doctrine was overruled in the case of *Tapling v. Jones*, in the House of Lords; and in the Common Pleas, in the same case, Keating, J., said: "The casual expression attributed to the lord chief baron, to be found in the judgment in *Cawkwell v. Russell*, 26 L. J. Exch. 46, is clearly extra-judicial, nor is the case itself to be found in the contemporary reports." 11 C. B. N. S. at p. 313.

^a *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300.

^b L. R. 2 Exch. 1; 36 L. J. Exch. 1.

nell, B., thought that such an assignment is effectual against the assignor only, and that he alone can be sued by the assignee for disturbance; Bramwell, B., on the other hand, thought that no reason had been, or could be shown, why a riparian proprietor could not assign his riparian rights in the same way and with the same effect as a person can assign any other species of property.

When an easement or right in water, or a water power, is claimed by virtue of an express grant, the mode and extent of the use is of course to be determined by ^{Easements by grant.} the words of the grant, which are seldom so similar as to make the decision of one case an exact precedent for another; and the question is one simply of construction in each particular case, but some general rules seem to have been recognized as aids in arriving at the result in such cases. The first is that when the words used in the grant are so ambiguous as to leave it in doubt whether the grant was of water to carry some particular mill, or to be used only for some special or limited purpose, or was of water *sufficient* to carry a particular mill, — referring to the mill simply as a measure of power or quantity, — the tendency of courts is to construe the grant as one of so much power or quantity of water rather than as a limit to a specific use, and so it would not be forfeited by using the water for any other lawful purpose or use. This construction is resorted to in cases of equivocal or ambiguous language, as being most beneficial to the grantee, and as most conducive to the public interests.¹

In *Biglow v. Battle*,² the plaintiffs, being the owners of the entire water power of the Charles River, at Natick, Mass.,

¹ See this principle of construction stated, or acted upon, in *Pratt v. Lamson*, 2 Allen, 282; *Cromwell v. Selden*, 3 Comst. 253; *Dewey v. Williams*, 40 N. H. 228; *Tourtellot v. Phelps*, 4 Gray, 374; *Kaler v. Beaman*, 49 Me. 207; *Biglow v. Battle*, 15 Mass. 312; *Wakeley v. Davidson*, 26 N. Y. 387; *Johnson v. Rand*, 6 N. H. 22; *Bullen v. Runnels*, 2 N. H. 255; *Borst v. Empie*, 1 Seld. 33; *Hurd v. Curtis*, 7 Met. 94; *Rogers v. Bancroft*, 20 Vt. 250; *Olmsted v. Loomis*, 6 Barb. 152; *Fiske v. Wilbur*, 7 Ib. 395.

² 15 Mass. 313. And *Cromwell v. Selden*, 3 Comst. 253, was much like it.

granted by lease to the defendants the privilege of taking from the plaintiffs' dam a specified quantity of water, "except when the quantity of water is so small as not to be sufficient to carry the plaintiffs' grist mill, and a cotton factory which may be erected, with not more than five thousand spindles." Instead of erecting a cotton factory, the plaintiffs afterwards built a paper mill," and brought an action against the defendants for taking more water from the plaintiffs' dam than by their lease the defendants had a right to take. For the defence it was insisted that the water power reserved for the plaintiffs was for the use of a cotton mill containing five thousand spindles. Until such a mill should be erected, the reservation was not to take effect. Being an exception in a grant, it should be taken most strongly against the grantors. It was no part of the contract that the plaintiffs should have a right to the water for the use of a *paper mill*. But it was held that the right reserved did not limit the use of the water to a cotton factory: that the true intent of the reservation was that the water should at all times be left sufficient to carry five thousand spindles. "It cannot be imagined," said the court, "that the plaintiffs would limit and restrict the use of their own privilege, nor could it be of any importance to the defendants, when the contract was made, to what use that part of the water to which they had no claim should be applied."

But, on the other hand, when the language of the deed clearly limits the use of the water to some specific object or purpose, the extent and mode of use must strictly conform to the grant, or it is lost.¹

Thus, in *Ashley v. Pease*,² the plaintiff, being the owner of an entire water privilege, granted and conveyed to the defendant's ancestor a fulling mill, and covenanted with him

¹ See *De Witt v. Harvey*, 4 Gray, 486; *Ashley v. Pease*, 18 Pick. 268; *Strong v. Benedict*, 5 Conn. 210; *Shed v. Leslie*, 22 Vt. 498; *Garland v. Hodsdon*, 46 Me. 511; *Deshon v. Porter*, 38 Me. 289. And see *Richardson v. Bigelow*, 15 Gray, 154; *Jennison v. Walker*, 11 Gray, 423; *Ganley v. Looney*, 14 Allen, 40.

² 18 Pick. 268. See, also, *Strong v. Benedict*, 5 Conn. 210.

that when there should be a sufficiency of water to carry and supply the uses of all the mills then standing, or which might thereafter be standing in their place, on the dam, he would suffer and permit him to draw from the flume "so much water as might be necessary to carry and supply the fulling mill then standing, or which might thereafter stand upon the lot" so granted; but where there was not a sufficiency of water for the purposes and uses aforesaid, then he was to draw water for the use of said fulling mill, or mills, twelve hours successively in the twenty-four, and no more.

The grantee also covenanted, in the same instrument, that he would never use or occupy the fulling mill, nor any other mill or building which might thereafter stand in the same place, so as to interfere with or obstruct the going or working of the plaintiff's saw-mill, or any other mill or building which the plaintiff might erect in the same place. The defendant erected a *carding machine* in the same building occupied as a fulling mill, and used the water for running both, but not both at the same time. The court held that it was manifest, from the general tenor of the contract, that it was the intention of the parties that the grant should be limited to the use of the water for driving the fulling mill only, and that the use of it for a carding machine was unauthorized. That this is what the parties intended, the court said, was confirmed by the grantee's covenant not to obstruct or interfere with the plaintiff's mills, by using and diminishing the water power, except by drawing water to carry and supply the fulling mill.

So where L., the owner of a water power, and a furnace and mills, devised the furnace and "the privilege of using water to blow with," it was held that the use of water was to be confined to blowing the bellows for the furnace, and could not be extended to using the power for grinding and finishing the castings made in the furnace, although such were the ordinary operations and uses of water in every furnace.¹ But the limits of this treatise will not allow us to pursue this subject farther.

¹ *Lincoln v. Lincoln*, 110 Mass. 449.

WAYS.

There are various kinds of rights of way ; for a right of way may be general in its character, that is, usable for all purposes, or it may be a limited right, as a right of way for carriages, but not for carts ; or, for horses, and not for carriages ; or, it may simply be a footway. So, also, the right may be limited as to time, for it may be a right to use the way only when certain gates are open, or between particular hours, or at certain times of the year.^c

If a right of way has been granted by deed, the extent of the right must be determined by the words of the deed,¹ though surrounding circumstances may be taken into consideration to determine the intention of the parties to the deed,^d and there being this guide, it is

^c *Jackson v. Stacey*, Holt N. P. 455; *Brunton v. Hall*, 1 Q. B. 792; 10 L. J. Q. B. 258; *Ardley v. St. Pancras Guardians*, 39 L. J. Ch. 871 (not elsewhere reported); *Watts v. Kelson*, L. R. 6 Ch. App. note, p. 169. In *Mercer v. Woodgate*, L. R. 5 Q. B. 26; 39 L. J. M. C. 21, it was held that a landowner may dedicate a way to the public, subject to a right reserved of ploughing up the soil, and temporarily destroying the way at particular times ; so also in *Arnold v. Blaker*, L. R. 6 Q. B. 433; 40 L. J. Q. B. 185, and *Arnold v. Holbrook*, L. R. 8 Q. B. 96; 42 L. J. Q. B. 80; and doubtless a private right of way may be granted subject to the same right of periodical obstruction. In an old case (*Tomlin v. Fuller*, 1 Mod. 27, called *Anonymous*, 1 Vent. 48) it was held that a right of way through a house can only be used at reasonable times, and that the owner of the house need not always leave his doors open; also, that if the doors are closed, the owner of the easement must request leave to pass.

¹ See *Miller v. Washburn*, 117 Mass. 371; *Bond v. Fay*, 12 Allen, 86. And for this reason a grant of a right merely "to cross" the grantor's land does not give the grantee a right to enter at one place, with timber, and, turning round in a space six or seven rods in width, come out at another place on the same side of the lot. *Comstock v. Van Deusen*, 5 Pick. 163. And a reservation by a grantor to pass from a certain street over the servient estate "to the line" of the dominant estate, does not give a right to pass along the boundary line between the estate after reaching the line. *Brossart v. Corlett*, 27 Iowa, 288.

^d *United Land Co. v. Great Eastern Railway Co.* L. R. 10 Ch. App. 586; 44 L. J. Ch. 685; *Cousens v. Rose*, L. R. 12 Eq. 366; *Choate v. Burnham*, 7 Pick. 74.

not very frequently that disputes arise as to the extent of ways so granted; but when rights of way have been acquired by prescription, or of necessity, questions as to the extent of the easement frequently arise.

The modern English cases seem to establish the principle that where there is an express grant of a right of way to a particular place, and the grantee is entitled to an unrestricted use of such place, the grant is not to be restricted to access to that place for the purposes for which access was required at the time of the grant.¹ Thus, in a late case, by an award under an Inclosure Act, there was set out, "one other private carriage road and drift-way called 'Broadmead Drive,' which shall forever hereafter remain a private carriage road and drift-way for the use of the respective owners and occupiers for the time being, of the allotments over which the same passes," and of several old inclosed meadows (specified), one of which was a field subsequently purchased by the defendants, under their statutory powers, and in which they erected a cattle pen, at the spot where said way or Broadmead Drive crossed their line, to be used for the collection of cattle to be conveyed from or to their railway. At the time of making the the original award the way was used merely for access to a few meadows, and only for agricultural purposes; but the defendants claimed a right to use it for driving cattle to and from their said cattle pen; and it was held they had a right so to do, as against the owners of the soil of the way, although the altered circumstances had thus greatly increased the amount of the travel and its character;² and *Allan v. Gome*, 11 A. & E. 759, and *Skull v. Gleinster*, 16 C. B. N. S. 816, were commented upon and distinguished, if not doubted.

If a right of way has been acquired by prescription, its extent must be measured and determined by the accustomed user; this, however, is a method of measurement not by any

¹ *Finch v. Great Western Railway Co.* 28 Weekly Rep. 229 (1879); *United Land Co. v. Great Eastern Railway Co.* L. R. 17 Eq. 158; affirmed on appeal, L. R. 10 Ch. App. 586; *Newcomen v. Coulson*, L. R. 5 Ch. D. 133.

² *Finch v. Great Western Railway Co. supra.*

means certain; and questions frequently arise whether the Measure of right of way acquired by prescription. accustomed user is not evidence of a general right for all purposes, though it may itself from surrounding circumstances have been limited to particular purposes, and it may also be open to doubt whether a user of one kind is not evidence of a right also for a more limited purpose, thus, whether a user of a way for carriages is not evidence of a right of way for horses, and whether a right of way for horses does not include a right of way for foot passengers. These matters cannot be determined by any general rules, but must, whenever disputed, be settled by a jury. There are, however, a few cases which have been argued on this topic, and may be used as guides for the future. In *Parks v. Bishop*,¹ it was declared that where a right of way exists by adverse use and enjoyment only, although evidence of the exercise of the right for a single purpose will not prove a right for other purposes, yet proof that it was used for a variety of purposes, covering every purpose required by the dominant estate in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may be reasonably required for the use of that estate, *while substantially in the same condition*. But if the condition and character of the dominant estate are substantially altered, — as in the case of a way to carry off wood from wild land, which is afterwards cultivated and built upon; or of a way for agricultural purposes to a farm, which is afterwards turned into a manufactory or divided into building lots, — the right of way cannot be used for new purposes, required by the altered condition of the property, and imposing a greater burden upon the servient estate.² In *Cowling v. Higginson*,³ it appeared that a way had immemorially been used for agricultural purposes in connection with a farm; but that until shortly before the action no coal had

¹ 120 Mass. 340. And see *Sloan v. Holliday*, 30 L. J. N. S. 757 (not elsewhere reported).

² *Atwater v. Bodfish*, 11 Gray, 150; *Wimbledon and Putney Commons Conservators v. Dixon*, 1 Ch. D. 362.

³ 4 M. & W. 245; 7 L. J. N. S. Exch. 265.

been carried over the way. The question was whether the accustomed user was evidence of a general right of way, including a right to carry coal from recently opened mines under the defendant's land. Lord Abinger, C. B., in giving judgment, said: "I should certainly say that it is not a necessary inference of law that a way for agricultural purposes is a way for all purposes; but that it is a question to be determined upon the various facts established in each case. If a way has been used for several purposes there may be a ground for inferring that there is a right of way for all purposes; but if the evidence shows a user for one purpose, or for particular purposes only, an inference of a general right would hardly be presumed." Parke, B., in the same case, said, that user for all the purposes for which the way was wanted, during the prescriptive period, would be evidence to go to the jury of a general right; that if the user of a way is confined to one purpose, doubtless a jury would not extend it; but if a way is used for a variety of purposes, a jury would be warranted in finding that the right extended to all purposes.^f In *Ballard v. Dyson*,^g the defendant in replevin avowed taking a heifer damage feasant, and the plaintiff pleaded a right of way for cattle to a certain building. It appeared that the building had formerly been a barn, but had

^f See, also, *Wimbledon and Putney Commons Conservators v. Dixon*, 1 Ch. D. 362; 45 L. J. Ch. 353; *Dare v. Heathcote*, 25 L. J. Exch. 245 (not elsewhere reported); *Jackson v. Stacey Holt*, N. P. 455; *Chichester v. Lethbridge, Willes*, 71. In *Wimbledon and Putney Commons Conservators v. Dixon*, Lord Justice James said that "when we consider these *dicta* and observations, in connection with the very clear language of the Court of Queen's Bench, in *Allan v. Gome*, 11 A. & E. 759, and of Lord Chief Justice Bovill and Mr. Justice Willes in the case of *Williams v. James*, L. R. 2 C. P. 577; 16 L. T. R. N. S. 664, I am quite satisfied that the true principle is the principle laid down in the later cases, namely, that you cannot, from evidence of user of property in its original state, infer a right to use it in whatever form and for whatever purpose that property may be changed; that is to say, if there be a right of way, however general, for whatever purposes, to a field, the person who is the owner of the field cannot from that say, I have the right to turn that field into a manufactory, or into a town or tan-yard, and then use the right of way for the purposes of the manufactory or town so built."

^g 1 Taunt. 279.

been converted into a stable, and that the last preceding occupier, who was a pork-butcher, had used it for slaughtering pigs, and that the then occupier, who was a butcher, used it as a slaughter-house for oxen. The way was so narrow that, when a cart was driven through, foot passengers were compelled to retreat into the houses on either side, and they would have been exposed to considerable danger if they had met horned cattle in the passage. The preceding occupier had been accustomed to drive hogs over the way, and the occupier at the time of the action had been used to drive a cart, the only carriage he possessed, drawn by a horse or ox, and had then recently begun to drive fat oxen for slaughter. The defendant admitted that there was sufficient evidence of a right of way for all manner of carriages, and it was, therefore, contended for the plaintiff that there was a right of way for all manner of cattle. Mansfield, C. J., said, that though in certain cases a general way for carriages may be good evidence from which a jury may infer a right of way for cattle, yet it is only evidence, and they must compare the reasons they have for forming an opinion on either side, and he instanced several cases in which it would be reasonable only to presume a grant of right of way for carriages. The chief justice added, that he could find no case in which it had been decided that a carriage-way necessarily implied a drift-way, though it appeared sometimes to be taken for granted, and Heath, J., stated, that a carriage-way would include a horse-way, but not a drift-way. Lawrence, J., said, "A grant of a carriage-way had not always been taken to include a drift-way. . . . The use proved here is of a carriage-way: the grant is not shown, and the extent of it can only be known from the use. If the use had been confined to a carriage-way, I should have had no difficulty whatever in saying that it afforded no evidence of a way for horned cattle, for, till they were driven there, no opposition could be made, nor the limitation of the right shown; but pigs have been driven that way, and stress is laid upon this circumstance. That may be good evidence of a right to drive pigs that way, but the user of the way for pigs is not proof of a right of way for oxen. The grantor

might well consider what animals it was proper to admit and what not. There is no danger from pigs, and carriages always have some one to conduct them. Cattle may do harm, and passengers cannot always get out of their way; but if the cattle are driven forward, serious injury may be done. The nature of the place, therefore, may probably have suggested a limitation of the grant."

In *Wimbledon and Putney Commons Conservators v. Dixon*,¹ the owner of a farm adjoining a common, and to which access for horses and carriages had been obtained from time immemorial by ancient tracks over the common from one point to another, but by no clearly defined road, sought to erect houses on a portion of his farm, and use a road which had recently been made in substitution for the ancient tracks over the common, for the purpose of drawing building materials, intending afterward to use it as a means of access to the houses when built. *Held*, that the owner of the farm had no right to increase the burden of the servient tenement by changing the character of his property, and that an injunction would be granted to restrain the owner of the farm from drawing the materials for the erection of the proposed houses, and from any other excessive user of the road. This decision was made notwithstanding the fact that, in addition to using the ancient tracks for access to the farm for ordinary agricultural purposes, the owner or his predecessors had also drawn over the tracks building materials for adding a wing to the farmhouse, and for converting a mud hovel into a brick cottage.

A right of way of necessity is coextensive with the necessity, both as to the mode in which the way may be used and as to the duration of the right, for it will be shown hereafter that a right of way of necessity is extinguished when the necessity ceases.² If, therefore, premises be demised to a tenant for a particular purpose, and he has no means of access to them other than by crossing his landlord's ground, he becomes entitled to a

Rights of way of necessity coextensive with the necessity.

¹ 1 Ch. D. 362.

² *Holmes v. Goring*, 2 Bing. 76; 2 L. J. C. P. 134; *Osborn v. Wise*, 7 C. & P. 761.

way of necessity over that ground, and the way must be suitable for the business to be carried on by the tenant.ⁱ

Under ordinary circumstances the owner of a private right of way is entitled to enter the way at one and the same place only, and not at any other; for instance, if a way to a field runs by the side of the field, the dominant owner is not entitled to alter the position of the gate through which he has been accustomed to pass from the field to the way, and to make a new passage at a fresh place. This is not, however, the rule in cases of public ways, and the distinction was pointed out by Chambre, J., in the case of *Woodyer v. Hadden*,^j when he said: "A public road differs from a private road in this; you may make an opening in your fence and go into it at any part of the length of the public road, or at the end; but in a private road you must go in at the usual and accustomed part." The reason for this rule seems to be that a private right of way must have its origin in a grant, and though a grantor may not object to a person entering his land from the way at one particular spot, for that may not cause him any inconvenience, yet it may be very much against his inclination that he should enter it at any other place. If a grant of the way has to be presumed, as in cases of prescriptive claims, it cannot be presumed that the grantor gave a right of access to the way at any other than the accustomed spot of entry; but if, on the other hand, the right of way has originated in an actual grant, and the grant can be produced, the right must be determined by the words of the deed, and it will not be presumed that the grantor intended it to be at the option of his grantee to enter the way at any other place than he himself specified in the deed. Dedication of a way to the public is very different from a grant of a private way, for a right of way so given is not appurtenant to land, and the public has a right to walk in every part of the way, and over it to any place to which it leads; it does not moreover originate in a grant; if, therefore, an

ⁱ *Gayford v. Moffatt*, L. R. 4 Ch. App. 133.

^j 5 Taunt. at p. 132; *Berridge v. Ward*, 2 F. & F. 208; *Marshall v. Ulleswater Steam Navigation Co.* L. R. 7 Q. B. 166; 41 L. J. Q. B. 41.

owner of a field abutting on a public way chooses to open a new gate, he has perfect right, being one of the public, to walk to and from that gate or point in the highway, just as he has to walk to or from any other spot on the road.

By deed the grantor of a private way may give to the grantee a right not only to enter the way at the accustomed place, but also at any other spot if it suits his purpose, and this may be done by express provision in the deed or by implication. Thus, in the case of *The South Metropolitan Cemetery Company v. Eden*^k it was said, though it was not necessary to determine the point for the purpose of the case, that under a grant of a way to certain lands *or any part thereof*, the grantee was entitled to block up the existing gates and open others at any fresh place in the border of the land. But, on the other hand, a grant of a field, *together with all ways to the field, or any part or parts thereof belonging or in anywise appertaining or usually held, occupied, or enjoyed therewith*, does not authorize the grantee to stop up an existing gate leading from the field to the way and open another at a fresh place.^l

A right of way appurtenant to a dominant tenement can be used only for the purpose of passing to or from that tenement.¹ It cannot be used even by the dominant owner for any purpose unconnected with the enjoyment of the dominant tenement, neither can it be assigned by him to a stranger and so be made a right in gross, nor can he license a stranger to use the way when he is not coming to or from the dominant tenement. These principles were determined in the case of *Ackroyd v. Smith*,^m which is the leading case on this subject. The ac-

Rights of way to be used only in connection with the dominant tenement.

^k 16 C. B. 42.

^l *Henning v. Burnet*, 8 Exch. 187; 22 L. J. Exch. 79.

¹ *Stearns v. Mullen*, 4 Gray, 151; *Smith v. Porter*, 10 Gray, 66. In the latter case a conveyance of land by A. to B., "with liberty to pass over my land where it is necessary," was held to give only a right of way to lands then owned by the grantee, and not to any he might subsequently acquire.

^m 10 C. B. 164; 19 L. J. C. P. 315. In *Skull v. Glenister*, 16 C. B. N. S. 81; 33 L. J. C. P. 185, Erle, C. J., said, "This right of way was ap-

tion was for trespass, and for the defence a right of way to certain land of the defendants was set up, the plea alleging that the defendants having occasion *for their own purposes* to use the way, passed over the place where the right existed, *for the purposes of them, the defendants*. To this plea there was a special demurrer, assigning for cause (among other things) that the defendants had not alleged that the trespasses were committed in passing and repassing to and from the above-mentioned land — that is, to and from the dominant tenement, but in passing and repassing for the purposes of the defendants generally, thereby claiming a more extensive right than that to which they were entitled. The material parts of the judgment of the Court of Common Pleas were as follows: “In support of the demurrer it was contended, first, that the road granted was only for purposes connected with the occupation of the land conveyed, and therefore was not sufficient to support the justification pleaded; and secondly, that if the grant was more ample and gave to the grantee a right of using the road for all purposes, although they might not be in any way connected with the enjoyment of the land, it would not pass to an assignee of the land, and therefore the defendants could not claim it under a conveyance of the land with the appurtenances. On the other hand, it was contended that the right created by deed might be assigned by deed, together with the land, and was large enough to maintain the justification pleaded. Upon consideration we have come to the conclusion that the plaintiff is entitled to our judgment on the demurrer. If the right conferred by the deed set out was only to use the road in question for purposes connected with the occupation of the land conveyed, it does not justify the acts confessed by the plea; but if the grant was more ample and extended to using the road for purposes unconnected with the enjoyment of the land (and this, we think, was the true construction of it), it becomes necessary to decide whether the assignee of the land and appurtenances

purtenant to the land demised by the Wheelers to the defendants. The defendants are therefore bound to make use of this way for purposes exclusively connected with their holding of these demised premises.”

would be entitled to it. In the case of *Keppell v. Bailey*" the subject of covenants running with the land was fully considered by Lord Chancellor Brougham, and the leading cases on the subject are collected in his judgment. He there says, at page 537, 'The covenant (that is, such as will run with the land) must be of such a nature as to *inhere in the land*,' to use the language of some cases, or it 'must concern the demised premises, and the mode of occupying them,' as is laid down in others; 'it must be *quodammodo* annexed and appurtenant to them,' as one authority has it, or as another says, 'it must both concern the thing demised and tend to support it, and support the reversioner's estate.' Now the privilege or right in question does not inhere in the land, does not concern the premises conveyed, or the mode of occupying them. A covenant, therefore, that such a right should be enjoyed would not run with the land. Upon the same principle it appears to us that such a right unconnected with the enjoyment or occupation of land cannot be annexed as an incident to it, nor can a way appendant to a house or land be granted away or made in gross; for no one can have such a way but he who has the land to which it is appendant. Bro. Abr. tit. Graunt, pl. 130. 'If a way is granted in gross, it is personal only, and cannot be assigned.' . . . 'So common in gross *sans nombre* may be granted, but cannot be granted over.' Per Chief Justice Treby in *Weekly v. Wildman*. It is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land and annex them to it, nor can the owner of land render it subject to a new species of burden so as to bind it in the hands of an assignee. 'Incidents of a novel kind cannot be devised and attached to property at the fancy or caprice of any owner.' Per Lord Brougham in *Keppell v. Bailey*. This principle is sufficient to dispose of the present case. It would be a novel incident attached to land that the owner and occupier should, for purposes wholly unconnected with that land, and merely because he is the owner and occupier, have a right of road over other land; and it seems to us that a grant of such a privilege or

" 2 Myl. & K. 517. See *Bronson v. Coffin*, 108 Mass. 175.

easement can no more be annexed so as to pass with the land than a covenant for any collateral matter. The defendants, therefore, as assignees, cannot avail themselves of the grant to John Smith, and our judgment must be for the plaintiff."

As, then, a right of way appurtenant to a tenement can be used only in connection with that tenement, and cannot be made a right in gross by assignment, it follows that the occupier of the tenement, and his licensees, alone to use a way. licensees who desire to pass to or from that tenement, can alone use the way; but for this purpose the owner of a tenement is considered the occupier, notwithstanding he has let it to a tenant, and is therefore not actually in occupation; and he may use a way appurtenant for any ordinary purposes connected with occupation of the tenement — as, for instance, for the purpose of collecting his rent, and seeing that the premises are kept in repair.^o

The dominant owner having only this limited right of using his way, is not entitled to use it for going to the dominant tenement and thence to some other place beyond, if the going to the latter spot was the substantial purpose of his journey, for he would then in effect be using the way for passing to some other place than the dominant tenement, and he would be imposing a greater burden on the servient estate than was intended by the grantor of the easement.^p He may not, therefore, make a mere colorable use of the dominant tenement so as to make it appear that the object of using the way was to go there, when, in fact, his intention was afterwards to go to a different place. Thus, in the case of *Skull v. Glenister*,^q an owner of land was entitled to a right of way through a lane from a highway, and he was possessed of ground adjoining the dominant tenement, on which he was building a number of cottages. In order to get the benefit of the lane for carrying the

^o *Hollis v. Proud*, 1 B. & C. 8.

^p *Lawton v. Ward*, 1 Ld. Raym. 75; *Howell v. King* 1 Mod. 190; *Colchester v. Roberts*, 4 M. & W. 769; 8 L. J. N. S. Exch. 195.

^q 16 C. B. N. S. 81; 33 L. J. C. P. 185; *Williams v. James*, L. R. 2 C. P. 577; 36 L. J. C. P. 256.

building materials to the ground on which the cottages were being built, he carried them first to the land to which the right of way was appurtenant, and having deposited them there, subsequently moved them to the land on which he was building. In the action it was held that he was not entitled, by making this mere colorable use of the dominant tenement, to carry the building materials over the way; and that it was for the jury to say, from the character of the defendant's acts, what was the intention with which those acts were done.

This point was much considered in an early case in Massachusetts.¹ The defendant having a right by deed to pass from a three-acre lot over land of the plaintiff to the highway, also owned a nine-acre lot adjoining the other, and not separated from it by any fence. The defendant gathered hay growing on both lots, and carried it over the three-acre lot, and this was held an abuse of his right, rendering him liable in trespass *quare clausum* for such excess. The facts were these:

By the division of a farm among part owners, the defendant became entitled to a right of way, as appurtenant to a three-acre lot, in and over the *locus in quo*, which, before the partition, was part of the same tenement. The defendant became possessed of another lot of nine acres, adjoining to and beyond the three-acre lot, by another title, which nine-acre lot was never a part of the same farm with the *locus in quo* belonging to the plaintiff. It further appeared that between the nine-acre lot and the three-acre lot, belonging to the defendant, there were no fences, and, being mowing land, the grass was cut and the hay made on both, without regard to the dividing line, the hay laid in windrows extending across both, and a load of hay taken partly from one and partly from the other was driven across the plaintiff's close, passing last from the three-acre lot. And the question was, whether the defendant was justified in so using the plaintiff's land; and the court were of opinion that he was not. "He had," said Shaw, C. J., "a special right of way for going to and

¹ Davenport v. Lamson, 21 Pick. 72 (1838); approved in Cotton v. Poccasset Man. Co. 13 Met. 433. And see New York Life Ins. and Trust Co. v. Milnor, 1 Barb. Ch. 353.

from the three-acre close ; and it would not be consistent with the terms of this grant to use the right of way to other closes beyond the three-acre close.

“ The rule seems to be well settled by the authorities, that if a man have a right of way over another’s land, to a particular close, he cannot enlarge it and extend it to other closes. *Com. Dig. Chimin, D. 5* ; *Senhouse v. Christian*, 1 T. R. 569 ; *Howell v. King*, 1 Mod. 190 ; *Woolrych on Ways*, 34. I do not consider this case as deciding, that where there is a right of way to a close for all purposes, and for all carriages, the owner of the close is bound to limit the use of it, and of his right of way, to the same purposes to which it was used before the grant, where there is no restriction in the terms of the grant. For instance, if the close, to which the private right of way is made appurtenant, has before the grant been used for agricultural purposes, and the apparent object of the way is to enable the owner to get off the produce, or to pass to and from it with teams, cattle, and carriages for the purposes of cultivation and pasturage. I do not consider this case as determining that he would not have a right, there being no restriction in the grant, to build a house, barn, and out-houses on the close, and to use the way for all purposes properly incident to the use and enjoyment of such house and buildings. The case goes to this extent only, that the defendant, having a right of way, as appurtenant to a three-acre lot, could not use it as a right of way to and from the nine-acre lot, which lay beyond the three-acre lot, and that throwing the whole into one close, by the removal of the fences, and using it as one entire close, and taking the hay from one and the other part indiscriminately, was in effect using it as a way to and from the nine-acre lot, although the cart passed last from the three-acre lot on to the plaintiff’s close, and that such use of the plaintiff’s land was beyond the limit of the right reserved and not justified.”

On the other hand, in a somewhat similar case of *Williams v. James*,¹ a very different result was arrived at. There the

¹ L. R. 2 C. P. 577. And see *French v. Marstin*, 24 N. H. 440, for similar views, though questions of pleading were also involved.

defendant by immemorial user had a right of way from a nine-acre lot over plaintiff's land to the highway, and also owned an adjoining lot, called Parrott's land, and mowed both lots and stacked the hay on the nine-acre lot, from which it was all afterwards carted over the plaintiff's land. The jury found that the stacking of the hay on the nine-acre lot was done honestly, and not with intent to get a way to the Parrott lot, and that there was no excess of user, apart from carting the hay grown also on the Parrott lot; and it was held that upon this finding the defendant was entitled to judgment; it being considered a question of fact, rather than of law, whether the defendant had made a fair and reasonable use of his right of way. The main apparent distinction between these two cases seems to be that in *Davenport v. Lamson* the right arose by deed, which in terms related only to the first lot, while in *William v. James* the right rested on prescriptive use, but as there was no evidence of any prior use except to the first lot, it is not easy to see how the right could be any more extensive than if it depended on grant. Bovill, C. J., thus supported the decision: "In all cases of this kind, which depend upon user, the right acquired must be measured by the extent of the enjoyment which is proved. When a right of way to a piece of land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant. Such a right cannot be increased so as to affect the servient tenement by imposing upon it any additional burden. It is also clear, according to the authorities, that where a person has a right of way over one piece of land to another piece of land, he can only use such right in order to reach the latter place. He cannot use it for the purpose of going elsewhere. In most cases of this sort the question has been whether there was a *bonâ fide* or a mere colorable use of the right of way. That was the question in *Skull v. Glenister*, and on which the case was ultimately decided. This question is excluded here by the finding of the jury.

"With respect to the purposes for which the land was used,

it is agreed on both sides that that question was raised and discussed at the trial, and the question whether there had been any excess in the user of the right of way, and also the question of the *bona fides* of Jenkins in stacking the hay, were left to the jury. The question, therefore, of what was the ordinary and reasonable use of the land, was practically left to the jury. They found that Jenkins acted honestly, and that is equivalent to finding that what had been done was done in the ordinary and reasonable use of the land to which the right of way was claimed, and in the ordinary and reasonable use of the right of way itself. It was for the plaintiff to show that there had been some excess of user on the part of the defendant, as by showing that the user of the right of way was only colorable, or that the nine-acre field was used for purposes other than those included in the ordinary and reasonable use of the land. The finding of the jury excludes both these questions. In considering the matters submitted to them the jury must have had to consider whether any additional burden had been cast upon the servient tenement. This was a necessary element for them to take into consideration in deciding whether there had been only an ordinary and reasonable use of the land in question. If no additional burden was cast upon the servient tenement the jury might well find that there had been only the ordinary and reasonable use of the right of way."

If a way leads to a highway, and not merely to private ground, a somewhat different rule of law prevails, for when a person is on a highway, he has full right, as one of the public, to go to any place to which the highway leads; if, therefore, a highway is one of the termini of a private way, and the dominant owner has a right of way to the highway, he may use his easement for the purpose of going to the highway, and then he may proceed elsewhere at his pleasure — not by virtue of his easement, but under his right as one of the public."

The question often arises whether the grantor of a right of way has a right to build over or cover the space of the way,

^r Colchester v. Roberts, 4 M. & W. 769; 8 L. J. N. S. Exch. 195.

the effect of which may be to darken the way, and perhaps obstruct the passage of some kinds of vehicles or loads. But obviously this may depend upon the particular terms or purpose of the grant. Thus, in *Atkins v. Bordman*,¹ the grant or reservation was of a "passage-way about five feet wide" leading from a public street in Boston, into a backyard, with "free liberty of ingress, egress, and regress through and upon said gate or passage-way for *carrying wood or any other thing* through the same, and over the yard or ground of the messuage granted, into, and from the land of the grantor for the use and accommodation thereof, without damnifying or annoying thereby the said grantee, his heirs, or assigns ;" and it was held that under this particular form or extent of the clause reserving the way, the owner of the land might lawfully cover such passage-way with a building if he left a space so high, wide, and light, that the passage-way was substantially as convenient as before, for the purposes for which it was reserved ; but this decision was apparently founded upon the peculiar kind of a way involved in that case ; for Shaw, C. J., says :

Right to
build over
ways.

"When no dimensions of a way are expressed, but the object is expressed, the dimensions must be inferred to be such as are reasonably sufficient for the accomplishment of that object. In the present case, the dimensions of the way are not expressed ; but the purpose for which it was reserved is expressed, and it goes far to enable us to ascertain the dimensions. It was for the purpose of carrying wood, or any other thing, into and from the grantor's "housing and land adjoining, for the use and accommodation thereof." The grantor's adjoining house, being a dwelling-house, it is to be limited to articles usually carried to or from a dwelling-house, in its ordinary occupation as such. It thereby excludes the presumption that it was to be adapted to the carriage of merchandise, such as bales, boxes, or casks. "Wood" must be taken to be fire-wood, and not timber or wood to be used for the purposes of manufacturing. And "any other thing," though in terms

¹ 2 Met. 457. And see prior case between the same parties, 20 Pick. 291.

of the largest sense, must be construed to mean other things of like kind used in a dwelling-house ; as vegetables, provisions, furniture, and the like.

Without examining it more minutely, we are satisfied that the right reserved was that of a suitable and convenient foot-way to and from the grantor's dwelling-house, of suitable height and dimensions to carry in and out furniture, provisions, and necessities for family use, and to use for that purpose wheelbarrows, hand-sleds, and such small vehicles as are commonly used for that purpose, in passing to and from the street to the dwelling in the rear, through a foot passage, in a closely built and thick y settled town."

On the other hand, in *Salisbury v. Andrews*, in the same court,¹ where tenants in common of a tract of land on the east side of Washington Street, Boston, with a court called "Central Court," leading out of Washington Street, and with high brick buildings erected on each side of said court divided their estate between them, but mutually agreed that all that part not set off to either "should be left and always lie open for the passage-way or court *aforsaid*, for the use and benefit of both parties and their respective estates," it was held that the "court" mentioned in said deed must remain open and uncovered for its entire length, and that an injunction would lie against one party or his assigns for building a bridge over said court at one place connecting the buildings on each side, by which another part of said estate on said court belonging to the other party or his assigns was seriously incommoded.

Questions often arise whether the owner of a private way through another's land has a right to an entirely free and open way the whole distance, or whether the landowner may lawfully erect gates or bars at the termini of the way, either where it enters the highway or at the opposite end. Obviously, the burden on the owner of the servient estate is much greater, if he must either leave the way entirely open for the inroads of others' beasts, and the escape of his own, or else fence both sides of the way for its entire

Gates and
bars on
private
ways.

¹ Not yet reported, but probably to be in 128 Mass. And see *Salisbury v. Andrews*, 19 Pick. 255; *Richardson v. Pond*, 15 Gray, 387.

length. On the other hand, the use of the way to the owner thereof is not so convenient, if he must delay to open and close gates, or remove and replace bars. When ways are created by express grant, this matter is frequently provided for by the grant itself.¹

But in cases of a general grant, express or implied, or of necessity, the rule seems to be that gates or bars may be lawfully erected at the termini of such ways without any liability for obstructing the way, and the way-owner would be liable in trespass for wrongfully removing the same.² The great preponderance of convenience to the landowner over the slight inconvenience to the way-owner, seems to make it "reasonable" in the eye of the law that such should be the rule. And if the landowner may rightfully erect and continue such *quasi* obstruction without any liability, it seems to follow that the way-owner must duly replace the same after he has passed; and if damage ensue for his neglect of this duty, he would be liable to the landowner therefor.³

This burden on the way-owner would, of course, be much increased, if the landowner might erect such gates and bars, not only at the termini of the way, but also wherever it passed through his adjoining lots separated from each other by a fence. This point does not seem to have been judicially settled, but apparently it would be governed by the same principles as before, viz., was it reasonable under all the circumstances to have so many gates and bars on such a way; a practical question always for the jury.⁴

If the way has been gained by *prescription*, and no gates or bars have ever been erected during the requisite term, it would seem from the analogies of the law that none can after-

¹ As in *Russell v. Jackson*, 2 Pick. 574.

² *Maxwell v. McAtee*, 9 B. Monr. 20, is directly in point, the gate there being situated at termini of way. And see *Bean v. Coleman*, 44 N. H. 546; *Garland v. Furber*, 47 N. H. 301; *Huson v. Young*, 4 Lans. 64; *Houpes v. Alderson*, 22 Iowa, 161; *Bakeman v. Talbot*, 31 N. Y. 366; *Baker v. Frick*, 45 Md. 337, a recent and valuable case.

³ See *Bean v. Coleman*, 44 N. H. at p. 546.

⁴ See *Huson v. Young*, 4 Lans. 64; *Baker v. Frick*, 45 Md. 337.

wards be erected, since the extent of the use is the measure of the right.

It may be mentioned here, that a right of way along a private road belonging to another person, does not give the dominant owner a right that the road shall in no respect be altered, or the width decreased ; for his right does not entitle him to the use of the whole of the road, unless the whole width of the road is necessary for his purpose ; but it is merely a right to pass with the convenience to which he has been accustomed ; the right, therefore, merely extends to that portion of the centre of the road which is necessary for the due exercise of the right of passage.^s The only obligation upon the servient owner is, that he shall not unreasonably contract the width of the road, or render the exercise of the right of passing substantially less easy than it was at the time of the grant.^t And even where a right of way was granted over certain roads marked on a plan, and one was described there as forty feet wide, it was held that the grantee was entitled to only a reasonable enjoyment of a right of way, and that such reasonable enjoyment was not interfered with by the erection of a portico which extended a short distance into the road so as to reduce it at that point to somewhat less than forty feet.^u

^s *Hutton v. Hamboro*, 2 F. & F. 218. There is a difference in this respect between public and private rights of way. In the case of *Reg. v. The United Kingdom Electric Telegraph Co.* (3 F. & F. 73; 31 L. J. M. C. 166) Martin, B., said: "In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences, one on each side, the right of passage or way, *primâ facie*, and unless there be evidence to the contrary, extends to the whole space between the fences; and the public are entitled to the use of the entire of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot-passengers." And this was approved by the full court.

^t *Hawkins v. Carbines*, 3 H. & N. 914; 27 L. J. Exch. 44; *Selby v. Nettlefold*, L. R. 9 Ch. App. 111; 43 L. J. Ch. 359.

^u *Clifford v. Hoare*, L. R. 9 C. P. 362; 43 L. J. C. P. 225.

THE AMERICAN RULE

on this subject seems to be that if the way granted is not *specifically defined*, but only "a right of way" is given, the way in point of width need be only such as is reasonably necessary and convenient for the purpose for which it was granted; and therefore, although in fact a broad way had been used by the grantor, yet the grantor might subsequently narrow it, or build upon it, so long as he left a way remaining of sufficient width and convenience for the grantee's legitimate use. Thus, in *Atkins v. Bordman*,¹ the owner of two adjoining messuages fronting easterly, situated on the west side of Washington Street, Boston, in 1703 conveyed the southerly one by a deed, in which, after stating that on the southerly side of the messuage granted "there is a gate and passage-way of about five feet wide leading from the street into the yard of the said messuage," the grantor "reserves unto himself, his heirs and assigns forever, free liberty of ingress, egress, and regress, through and upon said gate or passage-way, for carrying and re-carrying wood or any other thing through the same and over the yard or ground of the said messuage hereby granted, into and from the housing and land of the grantor for the use and accommodation thereof, without damnifying or annoying thereby the grantee, his heirs or assigns. And it is mutually agreed that whensoever the grantee, his heirs or assigns, are minded to make or add any addition of building backward, he or they shall only make the breadth to extend equal with the breadth of the back of the chimneys of said tenement hereby granted." Many years afterwards the grantee or his assigns extended said building backward several feet, by which the grantor was compelled to go around it, and about six feet farther west than he had for many years done; and the grantee also narrowed the "pas-

¹ 20 Pick. 291; and see 2 Met. 457. And a reservation of a right of way over land granted for the purpose of repairing a building adjoining such way, on other land of the grantor, the width of the way is not fixed, since the grantor might require more space for some kinds of repairs than others. *Phipps v. Johnson*, 99 Mass. 26.

sage-way" leading in from Washington Street, to the width of the old *gate*, about *four* feet, but it was held that although the grantor, assignee, and owner of the northerly messuage had enjoyed the passage-way *as it originally existed*, for a period long enough in itself to give a prescriptive title, yet that under the circumstances that use must be deemed to have been under and consonant with the deed and reservation therein, and should be explained and limited by the terms thereof; and that neither under the terms of such a reservation, nor under the long use, did the grantor or his assigns obtain a right to a way of a *fixed and definite width*, nor of an exact and unalterable location, and that it was sufficient, if the grantee still left him a suitable and convenient passage-way, substantially as convenient as before, for the purpose for which it was reserved. So where the owner of a block of stores and of land adjoining conveyed a part of the land, bounding it by a line parallel with the building and twenty feet from the same, "together with the right of passing and repassing over the space of twenty feet between the west wall of the store aforesaid, and the eastern line of the granted premises," it was held that this did not *necessarily* give the grantee a right to pass over the *whole twenty feet*, but only to a reasonable and convenient way within those limits, and therefore that the grantor might obstruct or use some part of said width, so long as he left sufficient for the reasonable uses of the grantor, which was a question of fact for a jury.¹

On the other hand, if the way granted is defined by metes and bounds, or described as of a given width, or otherwise defined, the grantor cannot subsequently narrow the way, even though he should have a sufficient width for all the actual uses of the grantee. Such a rule is necessary to the security of both parties; to the grantee, to insure him a way of known width and dimensions, the sufficiency of which he may judge of before he closes his contract for the purchase; and to the grantor, to secure him against the claims of the grantee to an indefinite right to pass over his premises. And Salisbury

¹ Johnson v. Kinnicutt, 2 Cush. 153.

*v. Andrews*¹ is a leading case, illustrating this kind of ways. There (eliminating the particulars not involved in this exact point) the owner of land on Washington Street, Boston, laid out a court over it extending from Washington Street to land in the rear called "Central Court," about fifteen feet wide, and having laid out house lots on each side of said court, and built two houses on different sides thereof, one of which he conveyed, describing it as "a brick house and the land under and adjoining the same, being No. 4 in Central Court," the front boundary of the land being on a line with the front of the house, "with a right to pass and repass on foot and with horses and carriages through said Central Court at all times," &c. At the time of the grant the shed of the grantor's other house retained by him formed one side of the court, and the house conveyed, formed the other side, and the whole space was paved with brick. It was held (among other things) that the grant in this particular case was of a way over the *whole space* between the grantor's shed and the house granted, and not merely of a convenient way to be afterwards defined, and that the grantor was liable for subsequently narrowing the court or way in front of the shed and elsewhere, although he had widened it in another place, and perhaps made it on the whole as convenient as before. On the same principle, if A. grants a right of way over his land, "as now laid out," he would not have a right to narrow the way as it in fact existed at the time of his grant, not even to insert gate-posts and hang a gate thereon; in the absence of any general usage to that effect.² Still more clearly, if the grant be of a right "to a street forty feet wide, and in, over, and through said forty feet street," all of which is owned by the grantor, and between his lots, and is so situated that there will naturally be much passing over the same, the grantee acquires a right to the whole width of forty feet, and the grantor cannot encumber or narrow any part of it,³ even though it may not all be actually needed by the grantee for the purposes designed. And this doctrine was pushed much farther in a recent case

¹ 19 Pick. 250.

² *Welch v. Wilcox*, 101 Mass. 162.

³ *Tudor Ice Co. v. Cunningham*, 8 Allen, 139.

in Massachusetts.¹ There the owner of a tract of land laid it out into streets and house lots, and sold the lots by auction on the premises. He distributed at the sale, and subsequently recorded in the registry of deeds, a plan on which the lots and streets were delineated, and to which the deeds referred. One deed bounded the land conveyed "on a forty feet street laid down on said plan, and called Youle Street." In fact, the street as shown on the plan was at one end wider than forty feet, namely, about seventy feet, and gradually diminishing to forty feet before it reached the land conveyed; and it was held that the delineation of the plan gave the grantee a right to the whole width of Y. Street as there laid down, and that the grantor could not narrow the end therefrom from seventy feet down to forty feet. And conversely if the width of the way granted is definitely fixed and stated in the grant, the grantee is not entitled to a wider way, even though the grantor had actually located a wider path, and which at the time of the grant was defined by visible objects. Thus, where the owner of a large tract of land fronting upon a public highway, sold a small lot in the rear, and covenanted in the deed that "a carriage-way at least twenty-five feet wide shall forever hereafter be kept open and unobstructed from said lot easterly to said road," it was held that the grantee was not entitled to a carriage-way forty-five feet wide, merely because one of that width had been in fact located and used by the grantor, and was defined by visible objects such as trees, fences, and buildings. The case was thought not like that of *Salisbury v. Andrews*, 19 Pick. 250, for there the right given was to pass through Central Court, a place which was laid out, had acquired a reputation, and was known by that name, and therefore it was there thought not to be a forced construction to regard the term "Central Court" as including all that had been previously laid out, paved, and fitted for the use of the houses upon it; and therefore it was there held that the grant was of a way limited and defined,

¹ *Farnsworth v. Taylor*, 9 Gray, 162 (1857). And see *Tobey v. Taunton*, 119 Mass. 410; *Fox v. Union Sugar Refinery*, 109 Mass. 296; *Stetson v. Dow*, 16 Gray, 373.

and not merely of a convenient way, to be defined. And although it is a familiar rule that when a right of way is granted *without any defined limits*, the practical location and use of such way for a certain width by the grantee under his deed acquiesced in for a long time by the grantor, may operate as a location and measure of the width of the way, as held in *Bannon v. Angier*, 2 Allen, 128, yet such a rule is one of practical construction adopted to ascertain the intent of the parties, when that is indefinite, and it will not be permitted to defeat an intention clearly expressed in the grant itself controlling the location and width of the way.¹

It is a question of considerable difficulty whether a right of way extends to two or more persons, if the dominant tenement is divided into two or more parts and becomes the property of several owners. It is manifest that in some cases much hardship and injustice would be produced by denying the right to all the owners of a severed estate, or by limiting it to one of such owners alone, excluding all the others from the benefit of the easement, and indeed, in the majority of cases, it would be impossible to determine which of several owners of a divided estate is entitled to the right of way, to the exclusion of all the rest; on the other hand, it is equally clear that if a large property to which a right of way is appurtenant is divided between many persons, the right could not be extended to all the new owners without imposing a greatly increased burden on the servient estate, and that increased burden would be imposed by the act of the dominant owner, which is contrary to the recognized principle of law, that no man can impose a burden on his neighbor's estate by his own act. In the case of *Codling v. Johnson*,^v a right of way was claimed as appurtenant to a close which had, till about fifty years before the action, formed a part of an open common; the common had at that time been inclosed, and the land was allotted to various persons. It was held that the right to the way by immemorial user could be supported, for it was possible that before the inclos-

Partition
of a dominant
tenement.

¹ *Stetson v. Curtis*, 119 Mass. 266.

^v 9 B. & C. 933; 8 L. J. K. B. 68.

ure the lord might have been entitled to the way for himself and his tenants, and in such event each person having an allotment of part of the dominant tenement would have the right of way. It is clear that in this case, supposing a right of way had been immemorially used by the lord and all his tenants, the burden on the servient tenement would not be greatly, if at all, increased by the allotment of the land to the tenants, and the distribution of the easement among them, each allottee becoming entitled to a distinct right of way; but this is an uncommon case. In *Bower v. Hill*^w a right of way for boats along a stream leading from an inn and an adjoining yard, which had formerly been one property, to a navigable river, was claimed. A severance of the yard from the inn took place about five years before the action, and the plaintiff, who sued for obstruction of the way, was nonsuited, on the ground that the easement was proved to belong to the inn and yard as one entire subject, and not to the frontage on the stream, in respect of which the plaintiff claimed the right of way. It was held that the nonsuit was right, for the evidence was that boats went to the inn and yard for such purposes as carrying coals or corn to be deposited in the granaries belonging to the inn, and materials for repairing the house. From such evidence it might fairly be left to the jury to presume a grant of right of way from the owner of the stream to the owner of the inn and yard, for the more convenient use and enjoyment of those premises, and there was no evidence that that right had ever been extinguished or released, but for all that, it appeared the occupier of the inn and yard still had full right to the easement created by such grant. The court thought that construing the grant as being capable of distribution on severance of the dominant tenement, would lead to very unreasonable consequences; for the result would be that two different persons would be entitled to use the way, or indeed as many different persons as possessed any share of the frontage, and that this would be a very unreasonable construction against the grantor, who might

^w 2 Bing. N. C. 339. See, also, *The United Land Co. (Limited) v. The Great Eastern Railway Co.* L. R. 17 Eq. 158; 43 L. J. Ch. 363.

have been contented to grant the right of way to the occupier of the inn and yard, from his knowledge of the degree of user which would follow from the grant when so limited. Independently of this, however, the court thought that if the grant had been produced in evidence, the plaintiff could not have brought himself within the description of the grantee, he not being the occupier of the inn and yard. The result of these authorities appears therefore to be, that if a dominant tenement is divided between two or more persons, a right of way appurtenant thereto becomes appurtenant to each of the severed portions, if such distribution of the easement is not at variance with the actual or presumed grant under which the right has been acquired ; and if the right has been acquired under a presumed grant, the circumstance, that distribution of the right will materially increase the burden on the servient tenement, is strong evidence that such distribution would be at variance with the grant.

IN AMERICA,

it seems to be settled that in all cases if a right of way is appurtenant to any close, it attaches to each and every part of the close, and it is immaterial into how many parcels the close may be subsequently divided, the owner of each close may enjoy the way, however much more burdensome such use may be to the owner of the servient tenement.¹

It is, of course, obvious that by the repeated severance of the dominant tenement the servient tenement might become subject to the passage of a hundred different persons, instead of the one original owner, and thereby the servitude be proportionally increased ; but such would also be the case if the dominant tenement should subsequently be owned by the same number of persons as tenants in common ; yet there can be no doubt in the latter case that each coöwner could have an individual right of way.

¹ *Underwood v. Carney*, 1 Cush. 285 ; *Watson v. Bioren*, 1 S. & R. 227 ; *Dawson v. St. Paul Ins. Co.* 15 Minn. 142 ; *Brossart v. Corlett*, 27 Iowa, 297 ; *Whitney v. Lee*, 1 Allen, 198 ; *Fox v. Union Sugar Refinery*, 109 Mass. 298 ; *Miller v. Washburn*, 117 Mass. 374.

In connection with the mode of user of ways, questions have at times arisen as to the right to deviate from a way on to the adjoining land, when the way itself is absolutely impassable, or in a state from the ordinary collection of mud, or want of necessary repair, which renders it inconvenient or reasonably unfit for passage. It is obvious that these questions may arise from different causes — the way may be close to the sea or a river, and may be regularly covered with water at high tide, or it may be covered only on extraordinary occasions ; it may happen that at some period of violent tempest the path may be altogether swept away for a certain distance, so that communication between the two ends remaining may be broken off ; it may happen, and frequently has happened, that a way has become impassable from want of ordinary repair, or it may happen that it is impassable through the act, right or wrong, of the owner of the soil. In all these, and possibly in other cases, an important question is likely to arise whether a person entitled to a right of way may pass over the adjoining land, or whether he must keep to the path, however inconvenient it may be, or give up his right altogether if the way is absolutely stopped, and it is clear that these questions may arise, both as to private and as to public ways. Most of these instances have arisen, but they have not always come before the courts.

If a way be close to the sea or to a tidal river, and is regularly covered with water at high tide or periodically when extraordinarily high tides occur, the existence or otherwise of a right for the public or for the owner of a private right of way to walk over the adjoining land must depend on the evidence. Ordinarily, however, it would seem that there is no such right, and that, in the absence of evidence to the contrary, it would be presumed that the dedication or grant was made subject to the periodical interruption ; and there would be no reason for presuming that, in addition to the right to walk over the path, the owner of the soil gave a further right to deviate over his land when the path was interrupted. There is no precise

Way becoming impassable — right to deviate.

Way periodically interrupted — right to deviate.

authority for this, but it has recently been held that a way may be dedicated to the public, subject to the grantor's right of periodical obstruction by ploughing up the soil ; and that the public have, in the absence of evidence to the contrary, no right to walk over the adjoining land when the path is less convenient from its being ploughed up,^x and the same reasons which produced that decision would apply to the case of a way periodically interrupted by the sea or other causes. If instead of being regularly and periodically obstructed by the sea the way is only interrupted on some extraordinary occasion by a flood, there does not seem to be any reason why the public or an owner of a private right should be entitled to walk over the adjoining land ; the case is one which is not likely to have been in the contemplation of the parties at the time of the dedication or grant, and there is consequently no reason for presuming the existence of a right to deviate from the path on to the adjoining land.

Interrup-
tion from
extraordi-
nary cause.

If by some tempest or other natural cause a road is absolutely swept away wholly or in part, there seems no doubt but that all rights of way over the part destroyed are totally lost, and that there is no right to walk over the adjoining land may be fairly assumed.

Destruc-
tion of a
road —
right to de-
viate.

That the right of way over a road destroyed is absolutely lost on its destruction seems clear from the cases of *Reg. v. The Inhabitants of Hornsea*,^y and *Reg. v. The Inhabitants of Greenhow*.^z These were both cases of indictments for non-repair of highways. In the former the road passed along a cliff which was washed away by the sea, and it was held that the parish could not be called upon to repair the part destroyed, for that the road was absolutely gone ; and in the latter case the road ran along the slope of a hill, and was destroyed, at all events temporarily, by a landslip. The cases differed, inasmuch as in the latter a trace of the old road was left, and the road could be remade at a moderate cost, and the

^x *Arnold v. Blaker*, L. R. 6 Q. B. 433; 40 L. J. Q. B. 185; *Arnold v. Holbrook*, L. R. 8 Q. B. 96; 42 L. J. Q. B. 80.

^y 1 Dears. C. C. 291; 23 L. J. M. C. 59.

^z L. R. 1 Q. B. D. 703; 45 L. J. M. C. 141.

parish was consequently bound to repair, whereas in the former the soil was wholly swept away, and there was no such liability. Both, however, are authorities to show that on total destruction of a road all rights of way over it are lost, and it is only reasonable to infer that when a right of way is destroyed no fresh right of way comes into existence on fresh soil, for no such right can arise except by dedication to the public, or by grant to an individual.

In cases in which ways have become impassable from want of ordinary repair a distinction has been made between public and private ways, it being said that in the former case the public have the right to walk over the adjoining land, whereas in the latter a grantee of a private right has no such privilege. It is said that this distinction is made because it is for the general good that a passage should be afforded to the public at all times, but that the same reason does not exist in the case of a private right of way.^a It is difficult to see any reasonable ground for this distinction, for the cause assigned for it violates the principle of law that a right in another person's soil can be created only by the act of the owner of the soil, express or implied. Rights of way can be created only by dedication to the public or by grant, actual or implied, to an individual, such dedication or grant being the voluntary act of the owner of the ground; but to hold that because a road over which the owner of land has given a right of way to the public is out of repair, another right of way over other soil is immediately vested in the public on whichever side of the old road the individual members of the public choose to take it, is to hold that a public right of way can come into existence otherwise than

^a Taylor v. Whitehead, Doug. 716; Bullard v. Harrison, 4 M. & S. 387. In Taylor v. Whitehead, Lord Mansfield remarked, that Blackstone, in his Commentaries, expresses an opinion that the law of England corresponds with the Roman law in extending the right of going on the adjoining ground when a road is out of repair to a private as well as a public way. This has been altered in some recent editions of the Commentaries, and the right of going *extra viam* is now limited to cases of highways and private ways of necessity.

by the act of the owner of the land, and even against his will.

The opinion that if a public way is out of repair, the public may pass over the adjoining soil has been shaken by the remark of Blackburn, J., in the case of *Arnold v. Holbrook*.^b It was said in the argument that it is laid down in all the text books that if a public way is foundrous and impassable the public have a right to go on to the adjoining land, but Blackburn, J., remarked that the foundation for those dicta is *Duncomb's case*,^c but that it would be found upon examination the facts in that case were that the defendant had narrowed the way; the road in that case was not merely out of repair but the grantor of the right had by his own act interfered with the right he had given to the public.

IN AMERICA,

the rule is well settled in this respect, that if a public highway becomes suddenly impassable by some natural obstruction or injury, such as snow drifts or heavy rains, a traveller may rightfully deviate therefrom and pass along the adjoining land, doing no unnecessary damage, and without being liable to the landowner for so doing. The leading case on this point is *Campbell v. Race*,¹ in 1851; and Judge Bigelow, in a masterly opinion, vindicated the wisdom and propriety of the decision.²

Highways, he said, being established for public service, and for the use and benefit of the whole community, a due regard for the welfare of all requires Grounds of the rule. that, when temporarily obstructed, the right of travel shall

^b L. R. 8 Q. B. at pp. 99 and 100.

^c Cro. Car. 366.

¹ 7 Cush. 408. And see *State v. Northumberland*, 44 N. H. 631; *Holmes v. Seeley*, 19 Wend. 507; *Williams v. Safford*, 7 Barb. 309; *Carlick v. Johnston*, 26 Q. B. (Ontario) 65.

² Quoting, also, 2 Bl. Com. 36; Woolrych on Ways, 50, 51; 3 Cruise Dig. 89; Wellbeloved on Ways, 38; Henn's case, W. Jones, 296; 3 Salk. 182; 1 Saund. 323, note 3; *Absor v. French*, 2 Show. 28; *Young v. —*, 1 Ld. Raym. 725; *Taylor v. Whitehead*, 2 Doug. 745; *Bullard v. Harrison*, 4 M. & W. 387; 3 Dane Ab. 258; 3 Kent Com. 424.

not be interrupted. And this right, therefore, rests upon the maxim of the common law, that where public convenience and necessity come in conflict with private right, the latter must yield to the former. Its exercise may also be justified upon the familiar doctrine that inevitable necessity or accident may be shown in excuse for an alleged trespass. If a traveller in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the travelled paths, so that he cannot reach his destination without passing upon adjacent lands, he is under a necessity so to do ; that is to say, the act to be done can only be accomplished in that way. Such a temporary and unavoidable use of private property must be regarded as one of those incidental burdens to which all property in a civilized community is subject.'

In the case above referred to, it was urged in argument that the effect of establishing this rule of law would be to appropriate private property to public use without providing any means of compensation to the owner. But it was remarked by the court in reply: "If such an accidental, occasional, and temporary use of land can be regarded as an appropriation of private property to public use, entitling the owner to compensation, which may well be doubted, still the decisive answer to this objection is quite obvious. The right to go *extra viam*, in case of temporary and impassable obstructions, being one of the legal incidents or consequences which attaches to a highway through private property, it must be assumed that the right to the use of land adjoining the road was taken into consideration and proper allowance made therefor, when the land was originally appropriated for the highway, and that the damages were then estimated and fixed for the private injury which might thereby be occasioned."

Having its origin in necessity, this right, it has been said, must be limited by that necessity; *cessante ratione, cessat ipsa lex*. "Such a right is not to be exercised from convenience merely, nor when, by the exercise of due care, after notice of obstructions, other ways may be

Not taking
private
property.

Right lim-
ited by the
necessity.

selected and the obstructions avoided. But it is to be confined to those cases of inevitable necessity or unavoidable accident, arising from sudden and recent causes which have occasioned temporary and impassable obstructions in the highway. What shall constitute such inevitable necessity or unavoidable accident, must depend upon the various circumstances attending each particular case. The nature of the obstruction in the road, the length of time during which it has existed, the vicinity or distance of other public ways, the exigencies of the traveller, are some of the many considerations which would enter into the inquiry, and upon which it is the exclusive province of the jury to pass, in order to determine whether any necessity really existed which would justify or excuse the traveller."

If a private way is rendered impassable by the act of the grantor the authorities show that the owner of a right of way would be justified in passing over the adjoining ground, provided it belonged to the grantor of the easement, and provided the act of deviation was a reasonable thing in connection with the user of the right.¹ In *Hawkins v. Carbines*^d it was held that as the grantor of a right of way had, subsequently to the grant, reduced the width of the way so that the grantee could not enjoy his easement so fully as at the time of the grant (he not being able to turn his horse and cart round as he could before the alteration), the grantee was justified in going a little farther on the grantor's land, as by so doing he could obtain full enjoyment of his right. So, also, in the case of *Selby v. Nettlefold*,^e where a tenant for life granted to a purchaser a right of way along a towing path by the side of a canal and subsequently built a bridge across the canal with an approach of such a character as to obstruct the towing path so that a person using the towing path must, on reaching

Obstruction by grantor — right to deviate.

¹ *Leonard v. Leonard*, 2 Allen, 543; *Farnum v. Platt*, 8 Pick. 339; *Bass v. Edwards*, 126 Mass. 449.

^d 3 H. & N. 914; 27 L. J. Exch. 44; *Dawes v. Hawkins*, 8 C. B. N. S. 857; 29 L. J. C. P. 343.

^e L. R. 9 Ch. App. 111; 43 L. J. Ch. 359.

the bridge, leave the path and pass over other land of the grantor to get round the bridge and thence to the other part of the path, it was held that the owner of the easement had a right to deviate in that way over the grantor's land, and that the grantor could not obstruct the substituted way.

If a way is out of repair and impassable, the grantee is justified in repairing it, and indeed it is his business to do so;¹ for when the use of a thing is granted, everything is granted by which the grantee can have and enjoy such use, and at common law the right to repair is incident to a grant of a right of way.^f

It is not often that difficulty is experienced in determining the direction of a way. If the right has been acquired by grant the deed almost invariably points out the termini to and from which the way is to be used, and a beaten path is in fact made; and if the right has been acquired by prescription the termini are never less certain; and, moreover, a path is almost sure in the course of time to get beaten out in such a manner that there can be no doubt by the time the right is acquired about the direction of the way. There are instances, however, in which the particular direction

¹ See *Doane v. Badger*, 12 Mass. 70; *Atkins v. Bordman*, 2 Met. 457; *Wynkoop v. Burger*, 12 Johns. 222; *Thompson v. Uglow*, 4 Oreg. 369; *Roberts v. Roberts*, 55 N. Y. 275; *McMillen v. Cronin*, 13 Hun, 68; which may be the reason he is not allowed to go over the adjoining land, by reason of a want of repair merely. See *Bakeman v. Talbot*, 31 N. Y. 372; *Capers v. McKee*, 1 Strobh. 168; *Holmes v. Seeley*, 19 Wend. 507; *Miller v. Bristol*, 12 Pick. 550.

^f *Gerrard v. Cooke*, 2 B. & P. N. C. 109; *Pomfret v. Ricroft*, 1 Wms. Saund. 320 d; *Taylor v. Whitehead*, Doug. 716; per Sir J. Romilly, M. R., in *Ingram v. Morecraft*, 33 Beav. 49. The principle is the same in the case of a public way. Where the flagstones of a foot pavement forming the roof of a cellar got out of repair from the public walking over them, it was held to be the duty of the vestry, and not of the owner of the cellar, to repair them. *Hamilton v. St. George's Vestry*, L. R. 9 Q. B. 42; 43 L. J. Q. B. 41. So, also, in the case of right to support, if the means of support give way, there is no obligation to repair on the part of the owner of the servient tenement; but the owner of the dominant tenement must repair, and he may enter on the servient tenement for the purpose. *Colebeck v. The Girdlers' Co.* 1 Q. B. D. at p. 243; 45 L. J. Q. B. at p. 230.

of a way is a matter of uncertainty. When a way is acquired "of necessity" there may be an uncertainty as to its direction, as there is neither a deed of grant nor prescriptive user to mark its course; but even in the case of a prescriptive right, and possibly in the case of a way created by express grant, the line of the way may be more or less indefinite, as was the case in the recent suit of *The Wimbledon and Putney Commons Conservators v. Dixon*,⁹ where it appears that the way in question passed over a common to a farm, but that there was no definite road, only a series of tracks in varying lines. The question of direction was not the main question in the case, but it was noticed at some length by Mellish, L. J., in his judgment, and the passage may be quoted here with advantage. He said: "I do not any more than the lord justice agree with what was thrown out by the master of the rolls as to the consequence of the track not being a perfectly definite track over the common, but being a track going in varying lines previously to the time when the new road was made. No doubt if a person has land bordering on a common, and it is proved that he went on the common at any place where his land might happen to adjoin it, sometimes in one place and sometimes in another, and then went over the common sometimes to one place and sometimes to another, it would be difficult from that to infer any right of way.¹ But if you can find the terminus *a quo* and the terminus *ad quem*, the mere fact that the owner does not go precisely in the same track for the purpose of going from one place to the other would not enable the owner of the servient tenement to dispute the right of road. Suppose the owner of this common had granted by deed to Mr. Dixon the right to go from the gate leading out of *Cæsar's Camp* to the highway by the National School, with carriages and horses at his free will and pleasure, I cannot suppose that the grant would fail in point of law because it did not point out the precise definite track between the one terminus and the other in which he was to go in using the right of way. If the owner of the servient

⁹ 1 Ch. D. 362.

¹ And see *Jones v. Percival*, 5 Pick. 485.

tenement does not point out the line of way then the grantee must take the nearest way he can. If the owner of the servient tenement wishes to confine him to a particular track he must set out a reasonable way, and then the person is not entitled to go out of the way merely because the way is rough and there are ruts in it and so forth."

When a right to a way of necessity is created on partition of an estate, it is somewhat difficult to determine what ought to be the direction of the way, and who is to have the privilege of setting it out, for it is obvious that it may frequently happen that the way the dominant owner would choose is not that which the servient owner would wish him to have, as a way in another direction, owing to the situation or condition of the servient estate, may be less objectionable to the servient owner than that the dominant owner would select. A difference, too, may exist in the case of land severed by will, and land severed by deed *inter vivos*, for, in the former case, the testator being dead before the partition is effected and the necessity arises, he can have no voice in the matter. One of the oldest cases bearing on this topic is Oldfield's case,^h which is reported very briefly as follows: "A. had an acre of land which was in the middle, and incompas'd with other of his lands, and enfeoffs B. of that acre. And resolv'd by the 4 Inst. that B. shall have a convenient way over the lands of the feoffor, and he is not bound to use the same way that the feoffor uses." From this case two points are gained: first, that the way must be convenient for the grantee; and, secondly, that though the grantor may have been in the habit of using a particular path the grantee is not necessarily bound to accept the same, but may have another if that is not convenient. There are remarkably few authorities on this subject, and, even of late years, the cases bearing on this matter are few; in *Osborn v. Wise*,ⁱ however, a dictum of Parke, B., at nisi prius, occurs, that learned judge being reported to have said: "If the way granted by the lease is of no use, the law would give as a way

Direction
of ways of
necessity.

^h Noy's Reports, 123.

ⁱ 7 C. & P. at p. 763.

of necessity the nearest passage along the land of the grantor to the nearest public highway." Though the route is therefore to be convenient to the grantee and the nearest passage to a highway, it cannot be supposed that Parke, B., intended that the interest of the grantor should be entirely overlooked; for if a beaten track led from the dominant tenement to the highway, doubtless the dominant owner would be obliged to take his way along that, and would not be suffered to make a fresh path through a standing crop on arable land, or to break a new passage through a hedge, or across a private garden, merely because such a course would be somewhat shorter or more convenient for him. Lastly, there is the case of *Pearson v. Spencer*,^j in which the matter came directly in question and received much consideration. The court distinctly recognized the principle that the way must be convenient for the grantee, and then continued in the judgment: "But there is a singular absence of authority as to the manner in which it is to be ascertained what is to be the direction of the convenient way thus created. In 2 Rolle's Abridgment, p. 60, Graunts, Z. pl. 17, it is said that the feoffor who grants the landlocked land, and retains the other, which thus becomes the servient tenement, shall assign the way where it is most convenient to himself. *Packer v. Welsted*, 2 Sid. 39, was a case where the grantor retained the landlocked tenement, which became the dominant tenement; it is said that he should take a way, and the law should adjudge if it was a convenient way. In each case it seems to have been thought that the person by whose act the way was created was subsequently to select the way, subject only to this, that it should be a convenient way. In the case of a devisee it is impossible for the testator, by whose act the way is created and who is dead, to do any subsequent act of selection, and if the line of way depends on his intention it must be discovered from the language of the will, understood with reference to the state of the property. It might be very difficult to state how the way was to be set out if the premises, before severance were so occupied as to afford no indication of what was the usual way in the testa-

^j 1 B. & S. 571; in Exchequer Chamber, 3 B. & S. 761.

tor's time, but this can rarely be the case in practice. In general, especially when, as in the present case, there was an occupation by a tenant, there must be an actual existing way by which the premises were used and enjoyed ; and we think we best effectuate the intention of the testator by construing the implied grant of a way to be a grant of that way actually used at the time."

From the same case of *Pearson v. Spencer*,^k it would seem that a way of necessity, once set out, cannot be varied in direction by the servient owner, except, it may be presumed, with the consent of the dominant owner.

Variation
of direction
of ways of
necessity.

IN AMERICA,

the prevailing rules, when a way by necessity is implied by the sale of one of two adjoining estates, seems to be :

1. That if a way *de facto* has been used in some particular location or route over one lot by the owner of both, the presumption is, in the absence of anything to the contrary, that the way shall continue where it has before been ; but this presumption would not prevent the owner of the servient tenement from assigning to the other some other practicable and reasonably convenient way over the premises. The owner of the dominant estate has a right to a way, but not necessarily to *the* way before used.¹

2. That if no such prior use has been made, and the way is to be located for the first time, the owner of the servient tenement has the first right to locate the way, provided he does so in a reasonable manner ;² but if he neglects to do so, upon request of the owner of the way, the latter may then locate the way, and he must do so in a reasonable manner, having regard to the inconvenience to the other party, as well as to his own ; and he has not an absolute right in all cases to take the "shortest cut" across the other's estate.³

^k 1 B. & S. at p. 584.

¹ See *Bass v. Edwards*, 126 Mass. 447.

² See *Nichols v. Luce*, 24 Pick. 104.

³ See *Fielder v. Bannister*, 8 Grant's Ch. R. (Ont.) 257; *Pinnington v. Galland*, 9 Exch. 1; *Smiles v. Hastings*, 24 Barb. 44; *Holmes v. Seeley*, 19

3. And after a way, whether of necessity or by grant, has once been duly located or assigned, there is no right, ordinarily, to change it, except by mutual consent, unless under extraordinary circumstances.¹

If a right of way be granted for a particular and continuing purpose, the purpose is to be regarded in construing the grant, in order to ascertain the nature and extent of the easement, and the grantee is entitled to vary his mode of enjoying the easement, and from time to time to avail himself of modern inventions, if, by so doing, he can more fully exercise and enjoy the object or carry out the purpose for which the easement was granted. Thus, in a case where a grant was made, in the year 1630, of certain lands, excepting the mines, and reserving to the grantor sufficient way-leave to the mines, it was held that the mine-owner was entitled to lay down a railway for the purpose of carrying his minerals, although railways were unknown at the date of the grant, for that the object of the reservation of way-leave for the mine-owner was to enable him to get the coals in a beneficial manner, and that there consequently passed to the mine-owner a right to such a description of way-leave, and a right of way in such a direction as would be sufficient to enable him from time to time to get all the minerals at a reasonable profit.¹

Grant for a continuing purpose.

Variation of mode of user.

If a man has power under an act of parliament, or otherwise, to make a way across another person's land, there can be little doubt but that he must exercise his power in a rea-

Wend. 507; *Capers v. Wilson*, 3 McCord, 170; *Nichols v. Luce*, 24 Pick. 102; *Hart v. Conner*, 25 Conn. 331. The owner of the way is in all cases entitled to a reasonably convenient and direct path. *Pratt v. Sanger*, 4 Gray, 84.

¹ See *Jaqui v. Johnson*, 27 N. J. Eq. 526, 552; *Evangelical Home v. Buffalo Hydraulic Association*, 64 N. Y. 563; *Jennison v. Walker*, 11 Gray, 423; *Smith v. Lee*, 14 Gray, 473; *Jones v. Percival*, 5 Pick. 485; *Bannon v. Angier*, 2 Allen, 128; *Chandler v. Jamaica Pond Aqueduct*, 125 Mass. 550; *George v. Cox*, 114 Mass. 388.

² *Dand v. Kingscott*, 6 M. & W. 174; 9 L. J. N. S. Exch. 279; *Bishop v. North*, 11 M. & W. 418; 12 L. J. Exch. 362; *Senhouse v. Christian*, 1 T. R. 560.

sonable manner, and have some regard to the convenience of the servient owner, so as to avoid inflicting on him needless and unreasonable injury. In *Abson v. Fenton*,^m mines were reserved by act of parliament for a lord of a manor on inclosure of a common, "together with all *convenient and necessary ways*, way-leaves, roads, and passages then already made and thereafter to be made, and liberty of laying, making, and repairing wagon-ways and other ways in, over, and along" the common land. In an action for making a wagon-way in an improper direction and manner, it was held that the true question for the jury was not whether the road had been made in the direction, or in the manner least injurious to the owner of the allotted land, or in that direction, or by that mode which a strict and rigid necessity would point out, and much less whether it had been made in that direction or by that mode which, upon a view of the work when accomplished, and when a better judgment might possibly be formed than could have been formed before, might be thought by persons possessing the highest degree of skill and experience to be the best that could have been devised; but whether the direction chosen was such as a person of reasonable and ordinary skill and experience would have selected beforehand, and whether the mode adopted was such as a prudent and rational person would have adopted, if he had been making the road over his own land and not over the land of another man. This view, it was added, in the judgment of the court, would, on the one hand, exclude all wanton, capricious, and causeless injury to the owners of the allotments, and, on the other, would admit of an exercise of the right reserved by the statute in such a manner as would make the right beneficial to the lord. In the case of *Dudley v. Horton*,ⁿ it had been enacted by act of parliament that in case mine-owners should find it expedient and necessary to make railways from their mines to a canal it should be lawful for them, if they could not agree with the owners of the land between their mines and the canal, to apply to certain com-

^m 1 B. & C. 195; 1 L. J. K. B. 94.

ⁿ 4 L. J. Ch. 104 (not elsewhere reported).

missioners, and that if it appeared to the commissioners that such railways were *necessary and fitting to be made*, the mine-owners should be empowered to make such railways. Certain mine-owners intending to exercise the power, the landowners applied to the Court of Chancery to restrain them from so doing, on the ground that the railway proposed to be made would be exceedingly injurious to the land, and was not necessary for the mine-owners within the meaning of the act. The vice chancellor was of opinion that the power was abused by the attempt to make the way in question, for it was intended to be fifty yards wide, of great length, and to be carried through the middle of the plaintiff's field; and that it mattered not that this great width was required because the nature of the ground rendered it necessary that the railway should be supported by an embankment on each side. An injunction was therefore granted to restrain the making of the line until the rights of the parties could be determined at law.

CHAPTER IV.

ON DISTURBANCE OF EASEMENTS AND ON LEGAL REMEDIES FOR THE SAME.

WHEN easements have been acquired and their extent and proper mode of enjoyment have been ascertained, it is very material for the owners of those rights to know when they have been infringed, as well as to understand the circumstances under which the law will afford them a remedy for their wrong. Besides this, it is important for them to understand when they may apply to the court for an injunction—that preventive remedy afforded in some cases by the law to ward off threatened injury, or to prevent the continuance of wrong already commenced. This is no part of the law of procedure, the consideration of which it is not designed to enter upon in this treatise; for it is one thing to inquire under what circumstances the law will give a remedy by action for damages or for an injunction, and another to ascertain the steps that must practically be taken to induce the court to afford those remedies: the former is a part of the substantive law, the latter is procedure. As it is not in contemplation to treat in this work on procedure, those rules relating to pleading which are to be found in the fifth section of the Prescription Act will not be considered in the present chapter, nor the alteration effected in them by the Judicature Act.

SECT. 1. — *On Disturbance of Easements generally, and on Legal Remedies for the same.*

Primâ facie, every person entitled to a natural right or to an easement is also entitled to the enjoyment of his right without disturbance, and any disturbance is a wrong for which the party injured has a remedy.

Right of
freedom
from dis-
turbance.

If the person causing the disturbance is merely exercising a natural right to which he is entitled, or an easement he has acquired, his act is justifiable, and the party disturbed can have sustained no legal injury. So, also, if he is exercising powers conferred upon him by act of parliament.^a

It is not, however, for every wrong committed that an action for damages will lie, or in which the court will grant an injunction, for there are many instances in which it is essential that actual damage shall have been sustained, in order that a right of action may arise. If, however, a *trespass* has been committed, an action will generally lie without proof of actual damage, for in all trespasses the law presumes that damage is sustained.^b As, however, natural rights and easements are rights which the dominant owner possesses not in his own land, but in or over the soil of another person, no *trespass* can be committed against the dominant owner if the enjoyment of his easement is disturbed, for the act by which the disturbance is caused is generally, if not always, upon the servient tenement; and it is therefore essential, for the maintenance of an action for disturbance of an easement, or of a natural right, that damage should actually have been sustained.^c

Actual damage requisite for cause of action in certain cases.

The principle of law, that no action will lie in the absence of actual damage or unless a trespass is committed, has been carried so far, that even in cases in which acts of parliament have expressly limited the time for commencing actions for injuries received through anything done under the provisions of the acts to a certain period — as, for instance, six months — from the time

Absence of damage within a time limited for commencing actions.

^a *Duke of Bedford v. Dawson*, L. R. 20 Eq. 353; 44 L. J. Ch. 549.

^b *Williams v. Morland*, 2 B. & C. 910; 2 L. J. K. B. 191; *Smith v. Thackerah*, L. R. 1 C. P. 564; 35 L. J. C. P. 276.

^c *Bonomi v. Backhouse*, 9 H. L. C. 503; 34 L. J. Q. B. 181; *Smith v. Thackerah*, L. R. 1 C. P. 564; 35 L. J. C. P. 276; *Wright v. Howard*, 1 Sim. & St. 190; 1 L. J. Ch. 94. It is questionable whether an infringement of the natural right to purity of water by pouring in and sending filthy matter on to the dominant owner's land does not involve a trespass on that land, and so give a cause of action without proof of actual damage.

when the act which caused the injury was committed, it has been held that the time within which the action may be brought is to be computed from the period when damage has been actually sustained, if the receipt of damage is essential for a cause of action, and not from the time when the act of disturbance was in fact committed.^d

Damage must be substantial. Slight damage by many persons.	The damage, however, which is requisite to give a cause of action for disturbance of an easement must be substantial in its character; it is not sufficient to show a merely nominal amount of injury; but if a number of persons, either acting together or independently, interfere with the enjoyment of an easement, an action will lie for an injunction against them all, though the obstruction caused by each of them individually is of a character insufficient in itself to support an action. ^e
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Disturbance of easements an injury to the right, which gives a cause of action.	Though the law will not allow presumptions of damage to be made, except in cases in which a trespass has been committed, yet, in the case of easements, it has been held that an action will lie for disturbance, although no special damage has resulted therefrom to the dominant owner: the reason for this is that <i>any disturbance</i> of his easement is an injury to the right of the owner as it tends to call his right in question, and as it may at a future time be proved as evidence in derogation of his title. <i>The injury to the right is sufficient actual damage to support the action.</i> Thus, where the inhabitants of a certain locality claimed a right to take water for use in their houses, from a spout in a highway, and the owner of land, through which the water flowed to the spout, from time to time abstracted the water to such an extent as to render the quantity which passed to the spout insufficient for the supply of all the persons entitled to use the water, it was held that an action would lie at the suit of one of the dominant owners, although he personally had sustained no actual injury, because the effect of the repeated acts of abstraction might furnish the foundation of a claim of right in the defendant in derogation
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^d Roberts v. Read, 16 East, 215; Gillon v. Boddington, 1 C. & P. 541.

^e Thorpe v. Brumfitt, L. R. 8 Ch. App. 650.

of the right of the plaintiff, which might be rendered valueless.^f So, it was also held, that if an obstruction is placed in a path, which being suffered to remain, would in course of time furnish evidence of abandonment of a right of way, an action will lie for the obstruction, although no damage has actually accrued therefrom, and even though the way has been impassable from natural causes, and unused for a long period.^g In support of the above propositions, the judgment of Little-dale, J., in the case of *Williams v. Morland*^h may be cited, for he said: "It is true that in trespass for a wrongful entry into the land of another a damage is presumed to have been sustained, though no pecuniary damage be actually proved. So, in the case of an action for the obstruction of a right of common, or a right of way, any obstruction of that right is a sufficient cause of action. The doing of any act calculated to injure that right is a sufficient ground of action; but, generally speaking, there must be a temporal loss or damage accruing from the wrong act of another in order to entitle a party to maintain an action on the case."

It has been a matter of some doubt whether the owner of a *natural right* could sue for disturbance unless he had applied the subject of the right to a purpose of utility, for unless he had done so, it was thought he could not have received damage from disturbance, and there are some expressions in the earlier cases reported which tend to support this view;ⁱ but if obstruction

Right to sue for disturbance of natural rights in the absence of actual damage.

^f *Harrop v. Hirst*, L. R. 4 Exch. 43; 38 L. J. Exch. 1.

^g *Bower v. Hill*, 1 Bing. N. C. 549.

^h 2 B. & C. at p. 916.

ⁱ In *Wright v. Howard* (1 Sim. & St. 190; 1 L. J. Ch. 94) it is said: "But although no man can acquire a right to the exclusive use of water except by grant, either express or presumed, yet, on the other hand, whatever exclusive use I may make of the water, I am not answerable to a court of law for it till actual injury to others arises. If my neighbor proves that I have done him an actual injury by the diversion of the water from its natural channel, he can sustain an action against me; but he has no right of action till injury has actually ensued. It does not, however, follow, as was asserted at the bar, that because no injury happens, or can happen, when the diversion is first made, that diversion cannot afterwards be the subject of complaint; on the contrary, if at

of an *easement* is such an injury to the right that it is sufficient to give a cause of action, any disturbance of a *natural right* must have a similar effect, and it appears to be now so determined, for, in the case of *Sampson v. Hoddinott*,^j it was said, in the judgment of the court, that if the user of the water of a natural stream by the defendant, a riparian proprietor, "has been beyond his natural right, it matters not how much the plaintiff has used the water, *or whether he has used at all. In either case his right has been equally invaded*, and the action is maintainable."

Disturbances of natural rights and easements may be arranged in two classes: in the first, those which merely affect the *occupier* of the dominant tenement, such as temporary obstruction of light or pollution of air; and in the second class, those which affect the estate of a reversioner. For the first class of disturbances the occupier who receives the personal injury can alone sue the wrong-doer, for the reversioner is not hurt; he sustains no injury even in cases of user which would, in process of time, confer an easement in derogation of a natural right, as no easement can be acquired against the reversioner

any time within the twenty years injury is the result, a remedy for that injury may be sought in an action. Should it so happen, that for twenty years my diversion of the water operates no injury to my neighbors, then, by virtue of the rule of law presuming a grant, I acquire at the end of that time an absolute right so to employ the stream. But if, in the twentieth year, an injury were to arise for the first time, that wrong would be as much the subject of legal redress as if it had existed at the first moment of the diversion." See, also, *Mason v. Hill* (3 B. & Ad. 304; 5 B. & Ad. 1); *Embrey v. Owen* (6 Exch. 353; 20 L. J. Exch. 212). In *Williams v. Morland* (2 B. & C. 910), the plaintiff appears to have been nonsuited, not because he was suing for disturbance of a natural right and failed to prove special damage, but because he did not prove the particular damage laid in the declaration.

^j 1 C. B. N. S. at p. 611; 26 L. J. C. P. at p. 150; *Swindon Waterworks Co. (Limited) v. Wilts and Berks Canal Navigation Co.* (in H. L.) 'L. R. 9 Ch. 451; L. R. 7 H. L. 697; 45 L. J. Ch. 638; *Crossley & Sons (Limited) v. Lightowler*, L. R. 3 Eq. at p. 296; 2 Ch. App. at p. 483; *Bicket v. Morris*, L. R. 1 H. L. Sc. 47; *Mott v. Shoolbred*, L. R. 20 Eq. 22; 44 L. J. Ch. 380; *Lord Norbury v. Kitchin*, 3 F. & F. 292; 15 L. T. 501.

by prescription when he is out of possession of the would-be servient tenement, for he cannot resist the user.^k

If the reversionary estate in a dominant tenement is in any way injured by the disturbance of an easement, not only may the occupier sue for the personal injury he has sustained, but the reversioner may also sue for the injury to the inheritance. Thus, in the case of *The Metropolitan Association for Improving the Dwellings of the Industrial Classes v. Petch*,^l it was held that a hoarding, by which ancient light was obstructed, might be of such a permanent character, and might be productive of such injury to a reversionary estate in a house, as to enable the reversioner to sue for the obstruction, for his right might be thereby prejudiced, as, for instance, if the hoarding was put up in denial of the right to light; a declaration, therefore, which alleged that the plaintiff was entitled to the reversion in a house in which there were windows through which the light and air ought of right to have entered, and that the defendant erected a hoarding whereby the light and air was prevented entering the said windows, and the said house was rendered dark and unfit for habitation *by means of which the plaintiff was injured in his reversionary estate*, was held to be good, and to show a cause of action. So, in the case of *Kidgill v. Moor*,^m it was held that a reversioner might maintain an action for the locking of a gate across a way, for that such an obstruction might be injurious to his reversionary interest. In *Jesser v. Gifford*,ⁿ also, it was held that if the value of the reversionary interest in a house is so diminished by the ob-

Right of action by reversioner.

^k *Simpson v. Savage*, 1 C. B. N. S. 347; 26 L. J. C. P. 50; *Metropolitan Association v. Petch*, 5 C. B. N. S. 504; 27 L. J. C. P. 330. See *Wilson v. Townend*, 1 Dr. & Sm. 324; 30 L. J. Ch. 25; *Parker v. Framingham*, 8 Met. 260; *Scheuley v. Commonwealth*, 36 Penn. St. 59.

^l 5 C. B. N. S. 504; 27 L. J. C. P. 330; *Shadwell v. Hutchinson*, 3 C. & P. 615; *Same v. Same*, 2 B. & Ad. 97; *Bedingfield v. Onslow*, 3 Lev. 209.

^m 9 C. B. 364; 19 L. J. C. P. 177, approved in *Richardson v. Bigelow*, 15 Gray, 159; *Hopwood v. Schofield*, 2 Moo. & Rob. 34; *Bell v. Midland Railway Co.* 10 C. B. N. S. 287; 30 L. J. C. P. 273; *Simpson v. Savage*, 1 C. B. N. S. 347; 26 L. J. C. P. 50.

ⁿ 4 Burr. 2141. See, however, *Battishill v. Reed*, 18 C. B. 696.

struction of ancient lights that it would sell for a smaller sum than it would have sold if the lights had not been obstructed, an action will lie at the suit of the reversioner. But an action will not lie at the suit of a reversioner against a trespasser who enters his land for the purpose of asserting a right to a way ; for such an act during a tenancy is not injurious to the reversionary estate, inasmuch as it cannot form evidence of a right against the reversioner.^o It may be noticed that in the case of *Bell v. Midland Railway Company*,^p Mr. Justice Willes remarked, that an act may be permanently injurious so as to entitle a reversioner to sue by affecting tenants ; thus, he added, an action on the case lies by a man “ if his tenants are impoverished by distresses to come to another court (Com. Dig. tit. Action on the Case for a Disturbance, A. 6) ; ” and “ if he threaten the tenants of another whereby they depart from their tenures (Ib. Malicious Misfeasance, A. 6). ”

An action will lie for *continuing* as well as for creating anything by which an easement is disturbed, and if the disturbance of an easement is continued after an action has been brought and damages recovered for the original act of disturbance, a second action may be brought for the continuance, and the judgment in the first action is no bar to the right to bring the second, whether it be at the suit of the occupier of the dominant tenement or of the reversioner.^q

Right of action for continuing a disturbance.

BREACH OF CONTRACT FOR AN EASEMENT.

Although an easement can be created only by deed, and no interest in the nature of an easement can be conferred by a writing not under seal, yet an agreement in writing only may be good as an agreement, and the parties thereto may be en-

^o *Baxter v. Taylor*, 4 B. & Ad. 72. But see *Tucker v. Newman*, 11 Ad. & El. 40 ; 9 L. J. N. S. Q. B. 1.

^p 10 C. B. N. S. at p. 307 ; 30 L. J. C. P. at p. 281.

^q *Shadwell v. Hutchinson*, 2 B. & Ad. 97 ; *Johnson v. Long*, Carth. 455 ; *Rosewell v. Prior*, 2 Salk. 460 ; 6 Mod. 116 ; 12 Mod. 635 ; *Saxby v. Manchester and Sheffield Railway Co.* L. R. 4 C. P. 198 ; 38 L. J. C. P. 153.

titled to sue for any breach. In the case of *Smart v. Jones*, one Hill agreed in writing, not under seal, that a certain man, Lewis, might dig and carry away cinders from a cinder-tip, the property of him, Hill, on payment of a certain price. The breach of agreement alleged was, that the cinders were not the property of Hill, and that Lewis was prevented taking them. It was urged for the defence that the agreement was void, it being an attempt to make a grant of a profit *à prendre* by an instrument, not under seal; but, on the other hand, it was said, that although an easement could not be conveyed without a deed, there might be a good verbal agreement to convey an easement if it were not for the statute of frauds, and that a distinction existed between an action for a breach of an agreement to give an easement and an action to maintain an easement properly created, which distinction was pointed out by Alderson, B., in delivering the judgment of the court in *Wood v. Leadbitter*.⁵ The court gave judgment for the plaintiff, for said Erle, C. J., it appeared to be merely a question whether when a party to a contract had broken his promise an action would lie against him for that breach; and Willes, J., said that no difficulty arose in the case with reference to the law respecting the grant of an incorporeal hereditament, for that it was not asserted that Lewis had any interest entitling him to enter and take the cinders; but reliance was placed on an agreement by which it was agreed that Lewis might enter for that purpose, and he did not get what he was to have under the contract by reason of a breach thereof by Hill, and that appeared to him to be actionable.

So an agreement to convey an easement, if otherwise valid, may be enforced in equity, and specific performance compelled.¹

It has already been remarked that if the owner of an easement exceeds his rightful enjoyment, or does anything which would after long user produce an increased right, or a new

⁵ 15 C. B. N. S. 717; 33 L. J. C. P. 154.

¹ 13 M. & W. 838; 14 L. J. Exch. 161.

¹ *Craig v. Craig*, 2 Ontario App. Rep. 588 (1878). And see *Hervey v. Smith*, 22 Beav. 299.

easement, the servient owner may in all cases obstruct or prevent the excessive enjoyment, or the user of the thing, which would enable the dominant owner, after a time, to increase his right.^t This right to obstruct the encroachment, as it may be termed, does not, however, entitle the servient owner to obstruct the rightful enjoyment also, unless it is impossible to obstruct the encroachment without also obstructing the rightful enjoyment.^u If it is impossible when obstructing the encroachment to avoid also obstructing the rightful user, the servient owner is often, if not generally, justified in obstructing the user altogether. Thus, in the case of *Cawkwell v. Russell*,^v Pollock, C. B., said that if a party has a limited right of the kind in question in that action, which was a right to pour clear water through a drain, and exercises that limited right in excess, as by pouring filth through the drain, the only remedy and the only way whereby the party can protect himself is by stopping the whole; and Alderson, B., said that if a man has a right to send clean water through my drain and chooses to send dirty water, every particle of the water ought to be stopped, because it is all dirty. It was therefore determined that the defendant was entitled to the verdict in the action for obstructing the water. It was formerly held that this principle of law applied to rights to light acquired under the Prescription Act as much as to other easements, and that if an owner of ancient lights enlarged his windows, or opened others near the ancient lights, and it was impossible to obstruct the enlarged portions or the new windows without also obstructing the ancient lights, the servient owner was justified in obstructing the whole, both new and ancient; but it was subsequently determined that rights to light acquired under the Prescription Act stand upon a different footing from other easements, owing to the peculiar form of words employed in the third section of the statute, and that if the new lights alone cannot be obstructed, the servient owner is

Justification for obstructing an easement when obstructing an encroachment.

^t *Ante*, chapter III. p. 281.

^u *Greenslade v. Halliday*, 6 Bing. 379; 8 L. J. C. P. 124.

^v 26 L. J. Exch. 34 (not elsewhere reported).

bound to submit to the increased burden, and is not justified in obstructing the ancient light.^w

It is impossible to lay down any general rule as to the cases in which the High Court of Justice will interfere by injunction to restrain the disturbance of an easement. There is no doubt that the remedy by injunction was much more rare formerly than it is at the present day, for the tendency of the Court of Chancery then was rather to leave an injured party to his remedy at law; but in late years applications to a court of equity became more frequent than formerly, and since the Court of Chancery had power conferred upon it to award damages,^x suits in equity to a great extent superseded actions at common law. This remark applies, perhaps, to obstruction of light more than to disturbance of any other species of easement, for the remedy by injunction in cases of obstruction, or threatened obstruction of light, was often deemed preferable and more efficacious than an action at law. Now that the Judicature Act has produced a merger of the courts of common law and equity, the probable effect will even be that scarcely any action will be commenced for disturbance of an easement without a claim also being made for an injunction. When considering the several species of easements, and the remedies for their disturbance, in the next section of this chapter, the rules which have been laid down from time to time by the Court of Chancery for its guidance in granting injunctions or awarding damages in cases affecting easements will be noticed, for even under the altered system of judicature the principles upon which the Court of Chancery acted may continue to be acted upon, and it is scarcely possible to lay down a general rule on this subject that shall be applicable to easements of all kinds. It may be remarked, however, that in *Heath v. Bucknall*,^y Lord Romilly, M. R., said that it may, no doubt, be laid down as a general axiom that where a man possesses a right to light and air over the property of his

When the court will restrain disturbance by injunction.

^w See *post*, title LIGHT.

^x This power was conferred by statute 21 & 22 Vict. c. 27, s. 2.

^y L. R. 8 Eq. at p. 6.

neighbor, the obstruction of which would be punishable at law in the shape of damages, a court of equity will, by injunction, prevent that obstruction, and though this rule was limited by the master of the rolls to cases of obstruction of light, it may not very inappropriately be applied to cases of disturbance of other easements, if the injury which would arise from the disturbance would be of a permanent character. The general axiom of the master of the rolls, however, does not contain all the essential characteristics which were requisite to induce the Court of Chancery to grant an injunction to restrain disturbance of an easement, for *Kindersley, V. C.*, in the case of *Wood v. Sutcliffe*² (not laying down any general rule, but limiting his judgment expressly to the case before the court, which was a suit for an injunction to restrain pollution of water), said: "If that be the case" (that is, if the plaintiffs were entitled to purity of water, and had sustained serious and continuous damage from the pollution by the defendants), "and if the restraining of those acts by injunction will restore, or tend to restore the plaintiffs to the position in which they have a right to stand, and in which they before stood, and if, moreover, the injury which is occasioned by the works complained of is of such a nature as that the recovery of pecuniary damages would not afford an adequate compensation, that is, such a compensation as would, though not in specie, in effect place the plaintiffs in the same position in which they stood before; and if, moreover (for there are several conditions), the plaintiffs do not sleep upon their rights, and do not acquiesce either actively or passively in the acts which they now complain of, but use due diligence and vigilance to take such steps as are proper and necessary for the vindication and protection of their rights, — if these conditions occur in such a case as that which is now presented here, the plaintiffs, the parties so injured, I conceive, have, as a general rule, a right to come to the court of equity and say, 'Do not put us to bring action after action for the purpose of recovering dam-

² 8 E. g. L. & Eq. 217; 21 L. J. Ch. at p. 255. See, also, per Mellish, L. J., in *Clowes v. The Staffordshire Potteries Waterworks Co.* L. R. 8 Ch. App. at p. 142; 42 L. J. Ch. at p. 112.

ages, but interpose by a strong hand, and prevent the continuance of those acts altogether, in order that our legal right may be protected and secured to us.' ”

To quote another passage in which the cases when the Court of Chancery would interfere by injunction to restrain the disturbance of an easement or other similar right, if the right had not been already disturbed, but there was merely a probability that it would be disturbed, Jessel, M. R., said, with reference to a right of shooting which was the subject of the case before the court: ^a “ Now what are the principles upon which this court interferes? I take it that in order to obtain an injunction a plaintiff who complains, not that an act is an actual violation of his right, but that a threatened or intended act, if carried into effect, will be a violation of the right, must show that such will be an inevitable result. It will not do to say a violation of the right may be the result; the plaintiff must show that a violation will be the inevitable result.” The master of the rolls then proceeded to cite the cases of *Haines v. Taylor*,^b *The Emperor of Austria v. Day*,^c and *Tipping v. Eckersley*,^d to show that this had been the principle on which the court had always acted in such cases.

In the first edition of this book the power of the Court of Chancery, under the act 21 & 22 Vict. c. 27, to award damages instead of granting an injunction for obstruction of an easement was noticed both in this place and in the subsequent section of this chapter where the disturbance of particular easements was considered. Now that this court has become a part of the High Court of Justice, under the Judicature Act, the consideration of this topic and of the recent cases decided before the Judicature Act, becomes, it is thought, superfluous, and it is therefore omitted. The only instance in which it is conceived to be possible that the cases bearing on this subject can become useful are those in which an owner of an easement has

Damages
— when
awarded
formerly
by the
Court of
Chancery.

^a *Pattison v. Gilford*, L. R. 18 Eq. at p. 262; 43 L. J. Ch. at p. 526.

^b 2 Ph. 209.

^c 3 De G., F. & J. 217.

^d 2 K. & J. 264.

sued alone for an injunction without claiming damages, and the court has thought the case not suitable for an injunction, but for pecuniary compensation, or has sued both for an injunction and damages. In the first instance it is presumed no such power as that which was given by the act 21 & 22 Vict. c. 27, is needed, for that the power of amendment given by the Judicature Act and Rules is sufficient for the purpose, and the appropriate remedy for the mistake. In case, however, the court should determine to be guided as to refusing an injunction and making any such amendment, if needed, or in giving damages, by the cases in which the Court of Chancery refused injunctions and awarded damages under the earlier act, the principal cases are given in the note below.¹

INJUNCTIONS, IN AMERICA,

are not usually granted until the complainant has first tried and settled his right at law, unless it be clearly established by the evidence that the defendant is liable at law.¹

Where, however, some irreparable injury would be done by delay, a preliminary or temporary injunction is often granted, until the right can be definitely determined.²

But in clear cases of a wrongful act on the part of the defendant of a continuing or permanent character,³ and espe-

¹ *Durell v. Pritchard*, L. R. 1 Ch. App. 244; 35 L. J. Ch. 228; *Senior v. Pawson*, L. R. 3 Eq. 330; *Isenberg v. East India House Estates Co.* 33 L. J. Ch. 392; *Curriers' Co. v. Corbett*, 2 Dr. & Sm. 355; *City of London Brewery Co. v. Tennant*, L. R. 9 Ch. App. 212; 43 L. J. Ch. 457; *Aynsley v. Glover*, L. R. 10 Ch. App. 283; 44 L. J. Ch. 523.

¹ *Dana v. Valentine*, 5 Met. 8; *Ingraham v. Dunnell*, *Ib.* 118; *Burnham v. Kempton*, 44 N. H. 78, an elaborate case; *Elmhirst v. Spencer*, 2 Macn. & Gord. 45. See *Coe v. Winnipiseogee Lake Co.* 37 N. H. 254; *Cummings v. Barrett*, 10 Cush. 186; *Rhea v. Forsyth*, 38 Penn. St. 507; *King v. McCully*, 38 *Ib.* 76; *Jackson v. Newcastle*, 33 L. J. N. S. Ch. 698; *Van Bergen v. Van Bergen*, 3 John. Ch. 282; *Reid v. Gifford*, 6 *Ib.* 19; *Burden v. Stein*, 27 Ala. 104; *Bliss v. Kennedy*, 43 Ill. 74; *Biddle v. Ash*, 2 Ashm. 211; *Bean v. Coleman*, 44 N. H. 539; *Prentiss v. Larnard*, 11 Vt. 135; *Wilson v. Cohen*, Rice Eq. 80.

² See *Ingraham v. Dunnell*, 5 Met. 118.

³ See *Webb v. Portland Man. Co.* 3 Sumn. 189; *Lyon v. McLaughlin*, 32 Vt. 426; *Carlisle v. Cooper*, 6 C. E. Green, 568; *Merrifield v. Lom-*

cially after the plaintiff has established his right by a suit or successive suits at law,¹ this preventive remedy is familiar in American jurisprudence.

More especially will equity interpose by injunction when for want of privity between the owners of the alleged dominant and servient estates, or otherwise, it is doubtful whether an action at law could be maintained; as where an estate has been granted upon a condition or covenant that no buildings shall be erected thereon, or only in a certain situation, and both estates have passed into other hands, equity will often enjoin the present owner of the servient estate, at the suit of the present owner of the dominant estate, even though it be doubtful whether a suit at law would lie.²

So equity is more ready to take jurisdiction where an action at law, if successful, would furnish but inadequate redress, as in cases of corrupting water, air, the health and comfort of the parties, &c.³

bard, 13 Allen, 16; *Stevens v. Stevens*, 11 Met. 251; *Shields v. Arndt*, 3 Green Ch. 234; *Gurney v. Ford*, 2 Allen, 576; *Owen v. Field*, 102 Mass. 112; *Kirkendall v. Hunt*, 4 Kan. 514.

¹ *Hill v. Sayles*, 12 Cush. 454.

² See *Barrow v. Richard*, 8 Paige, 351; *Hubbell v. Warren*, 8 Allen, 173; *Winfield v. Henning*, 6 C. E. Green, 190; *Parker v. Nightingale*, 6 Allen, 341; *Peck v. Conway*, 119 Mass. 546; *Gibert v. Peteler*, 38 Barb. 513; *Whitney v. Union Railway Co.* 11 Gray, 359; *Brouwer v. Jones*, 23 Barb. 153; *Tallmadge v. East River Bank*, 26 N. Y. 105; *Brewer v. Marshall*, 4 C. E. Green, 543; *Greene v. Creighton*, 7 R. I. 1; *Clark v. Martin*, 49 Penn. St. 289; *Jeffries v. Jeffries*, 117 Mass. 190; *Linzee v. Mixer*, 101 Mass. 512; *Schwoerer v. Boylston Market Association*, 99 Mass. 285. It is not, however, in every case of a conveyance upon a condition not to build on the lot conveyed, that the subsequent grantees from the same grantor can maintain a bill for an injunction against subsequent purchasers from the original grantee, who violate the condition. It must appear that the original grantor had in contemplation the division of the land into separate lots or parcels, which would be held by different owners, or that the condition was inserted in the deed for the purpose of creating a restriction on the use of the land as between subsequent grantees of different lots or parcels thereof. See *Jewell v. Lee*, 14 Allen, 150; *Badger v. Boardman*, 16 Gray, 559; *Dana v. Wentworth*, 111 Mass. 291; *Sharp v. Ropes*, 110 Mass. 386. *Winfield v. Henning*, 6 C. E. Green, 188, seems broader than the English or Massachusetts decisions on this point.

³ See *Holsman v. Boiling Spring Bleaching Co.* 1 McCarter, 335; *Mer-*

But equity will not interfere by injunction at the suit of a private party to abate a *public* nuisance, — like an obstruction to a highway, — the plaintiff not being owner of any land abutting on the highway, but only a traveller, and injured therefore only in common with the general public, though perhaps in a greater degree.¹

This application for injunction is, of course, as in all other cases, addressed to the sound judicial discretion of the court,² and may be refused, even if it be clear that the party has a remedy at law.

But when a court of equity does take jurisdiction it acquires *complete* jurisdiction, and may not only enjoin against a future infringement, but may also abate an existing obstruction,³ and likewise award damages for the past.⁴

The particular application of these principles to various kinds of easements and natural rights will be considered in the second section of this chapter.

SECT. 2. — *On Disturbance of Particular Easements, and on Legal Remedies for the same.*

The rules and principles of law relating to disturbance of easements generally, and the remedies which the law affords for such disturbance, having been considered in the preceding part of this chapter, it is the purpose of the present section to explain when and to what extent the law forbids disturbance of particular kinds of easements and natural rights, as well as the circumstances under which the court will restrain disturbance by injunction.

rifield v. Lombard, 13 Allen, 16; *Bemis v. Upham*, 13 Pick. 169. And see *Richmond Man. Co. v. Atlantic De Laine Co.* 10 R. I. 106.

¹ *Hartshorn v. South Reading*, 3 Allen, 501. And see *Dawson v. St. Paul's Ins. Co.* 15 Minn. 138.

² See *Wood v. Sutcliffe*, 8 Eng. Law & Eq. 217; *Owen v. Field*, 12 Allen, 457.

³ *Earl v. De Hart*, 1 Beasl. Ch. 280; *Van Bergen v. Van Bergen*, 2 John. Ch. 272; *Attorney General v. N. J. Railroad Co.* 2 Green Ch. 136 and note.

⁴ *Gurney v. Ford*, 2 Allen, 576.

AIR.

It has been shown that natural rights and easements with reference to air are of two kinds, namely, those connected with the free passage of air, and those connected with purity of air, and that though a right to free and uninterrupted passage of air to a window may be acquired by prescription or grant, yet that no right to the uninterrupted flow of wind to a windmill can be so acquired. This being so, no action can be maintained by the owner of a windmill against a landowner who, by building, obstructs the wind, to the damage of the mill ;^f but, from the earliest times, a right of action for obstruction of air which would have entered a window, has been recognized by law, if a right that the air shall be uninterrupted has been acquired ;^g and the court will, if the case demands it, restrain such obstruction by injunction.

Right of
action for
obstruction
of air.

It has been one of the objects of this work always to mark the distinction between the easements of free passage of light and free passage of air. It has been shown that they are acquired by prescription by different means, rights to lights being acquired under the Prescription Act, which does not touch rights to free passage of air, and rights to free passage of air being acquired by prescription at common law, by which means the House of Lords has said rights to light cannot now be acquired.^h Still it is a common practice to couple them together as if they were one and the same easement ; or, as if they were at all events so united that where there was the one there also was the other, and where the one was disturbed there also was the other. This is an error, and the only point in common between them is that they both have their being with reference to windows, and no doubt doors and other openings in the walls of houses. As in speaking of these easements it has been a common custom to couple them together, so in suing

Free pas-
sage of air
and light
disting-
guished.

^f *Webb v. Bird*, 13 C. B. N. S. 841; 31 L. J. C. P. 335.

^g *Aldred's case*, 9 Coke, 58.

^h *Ante*, chap. II. sec. 2, p. 210.

for obstruction of the one it has also been the custom to charge the offender with obstruction of both, and yet how obvious it is that the cases must be innumerable in which the light accustomed to come to a window is obstructed while the air is in no appreciable way impeded. It is strange that until recently the impropriety of this practice of coupling these rights was not noticed in the courts; but attention has now been called to it in two cases. The first of these is *The City of London Brewery Company v. Tennant*.⁴ In that case Lord Selborne, C., said at the end of his judgment that the only other point which it occurred to him to notice was about air. He had observed that in all that class of cases a formula had crept into the pleadings, and from the pleadings had passed into evidence, as to air as well as to light; but the nature of the case which would have to be made for an injunction by reason of the obstruction of air was *toto cælo* different from a case of light. Cases, he added, are very rare indeed, and must be very special, such as to involve danger to health or something very nearly approaching to that, to justify the interference of the court on the ground of the diminution of air. The other case is *Baxter v. Bower*,⁵ in which it was said that all the forms of injunctions inserted the word "air" as well as "light," but that the former word ought not to be inserted unless it was specially directed, and James, L. J., said the court never puts in the word "air" now unless it is really required.

As well as for the obstruction of the free passage of air, when a right to free passage has been acquired, an action will lie for its pollution, for purity of air is a natural right; if, therefore, the owner of land, though making a perfectly legitimate use of his own property, pollutes the air which passes to the land of another person in an unjustifiable manner, the latter can maintain an action against him to recover damages, or he may obtain an injunc-

Injunctions to restrain obstruction of air — when granted.

Right of action for pollution of air.

⁴ L. R. 9 Ch. App. 218; 43 L. J. Ch. 457.

⁵ 44 L. J. Ch. 625 (not elsewhere reported).

tion to restrain the pollution.^k In *Dana v. Valentine*¹ it was held that an injunction would not be granted in favor of the owner of *vacant* lots, to restrain the carrying on some offensive trade in the vicinity; since there being no certainty that any dwellings would ever be erected on such vacant lots, or, if so, at what future time, there was no necessity for such an extraordinary remedy, to require which the injury must actually exist, or the danger of it be so certain and immediate as to amount to a present injury. It is to be noticed that it is only when air is polluted *in an unjustifiable manner* that a landowner has a remedy for the nuisance inflicted upon him, and that it is not in every instance, nor for every degree of pollution, that an action will lie; in every instance the right to sue depends upon the extent and nature of the pollution, and the circumstances under which the pollution is produced. It was said by Lord Westbury in the case of *St. Helen's Smelting Company v. Tipping*,^l which was an action for pollution of air by emission of noxious gases from copper smelting works: "If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there

Pollution
must be
unjustifiable.

^k Aldred's case, 9 Coke, 58; *Walter v. Selfe*, 4 De G. & Sm. 315; 20 L. J. Ch. 433; *Beardmore v. Tredwell*, 3 Gif. 683; 31 L. J. Ch. 892; *Tipping v. St. Helen's Smelting Co.* L. R. 1 Ch. App. 66; *Crump v. Lambert*, L. R. 3 Eq. 409; *Morley v. Pragnel*, Cro. Car. 510.

¹ 5 Met. 12.

^l 11 H. L. C. at p. 650; 35 L. J. Q. B. at p. 72.

unquestionably arises a very different consideration." This being the case, it becomes very material to determine under what circumstances pollution of air is justifiable.

In the first place, it may be taken as a rule that the fact that the air is more or less polluted by other persons does not justify a man in increasing that pollution. Thus, in the case of *Tipping v. St. Helen's Smelting Company*, above noticed, the jury found the existence of the injury, and the only ground on which it was asked that the verdict might be set aside and that a new trial might be directed, was, that the whole neighborhood where the copper smelting works were carried on was a neighborhood more or less devoted to manufacturing purposes, and therefore it was said that, inasmuch as the copper smelting was carried on in what was called a fit place, it might be carried on with impunity, although the result might be the utter destruction, or the very considerable diminution, of the value of the plaintiff's property. It was held that that was not a sufficient reason for setting aside the verdict of the jury, which was in favor of the plaintiff.^m The rule in this respect, with regard to air, is the same as that in the case of water, for the fact that many other persons pour filthy matter into a stream, and so render the water unfit for use, does not justify a manufacturer in adding to the pollution.ⁿ

The circumstance that a person comes to a place where the air is already polluted, is not of itself sufficient to deprive him of his right to purity of air, for purity of air is a natural right incident to the possession of land, and cannot be destroyed except by an adverse right to pollute the air acquired by another person. A right to pollute the air has been shown to be an easement which can be acquired only by grant or by prescription — that is, when an uninterrupted practice of polluting has been continued for twenty years; the mere fact, therefore, of the first comer erecting a factory and polluting the air, does not give him any

^m See, also, *Cooke v. Forbes*, L. R. 5 Eq. 166; 37 L. J. Ch. 178.

ⁿ *Crossley & Sons (Limited) v. Lightowler*, L. R. 2 Ch. App. 478; 36 L. J. Ch. 584.

right to continue that pollution to the nuisance of a new comer to the neighborhood :¹ and the latter, until an adverse easement is gained, may rest upon his natural right and sue for the pollution. The case of *Bliss v. Hall*^o was an action for polluting the air by melting tallow and making candles ; and the defence set up in the plea was, that the defendant possessed his candle factory for three years before the plaintiff became possessed of his house, and that when the defendant first became possessed of his factory, the furnaces and stoves were erected, and the defendant, from the time when he so became possessed of the factory till the plaintiff became possessed of his house, had always carried on his trade of making candles. To this plea there was a demurrer, and it was held that the matters alleged for the defence formed no answer to the complaint in the declaration, for that the plaintiff came to the house he occupied with all the rights which the common law affords, and that one of them was a right to wholesome air, so that, unless the defendant could show a prescriptive right to pollute the air which was accustomed to flow to the plaintiff's house, the plaintiff was entitled to judgment. So, also, Vice Chancellor Wood, in the case of *Tipping v. St. Helen's Smelting Company*,^p held that the fact of the plaintiff having come to the nuisance did not disentitle him to the aid of the Court of Chancery to stop the pollution of the air by injunction.

Pollution of air is very frequently produced by the carrying on of trades which are in themselves perfectly lawful, and, until they cause annoyance to neighboring landowners, altogether free from objection. It is essential for the welfare of the nation that these trades should be carried on somewhere, for by them many of the ordinary necessities of life are supplied ; but it is in many instances unavoidable that the comfort of persons who dwell

Unavoidable pollution by carrying on trade.

¹ *Commonwealth v. Upton*, 6 Gray, 473, overruling a dictum to the contrary in *Rex v. Cross*, 2 C. & P. 484. See *Rex v. Neville, Peake*, 125; *Stokoe v. Hew Singers*, 8 El. & Bl. 31.

^o 4 Bing. N. C. 183; 7 L. J. N. S. C. P. 122.

^p L. R. 1 Ch. App. at p. 67.

in the neighborhood should be disturbed, and even that property should be injured by the noxious fumes which are produced by their means. Numerous trades of this kind, which are more or less detrimental, might be named, but it will suffice to mention brick-burning, candle-making, and copper-smelting, as instances ; and it becomes a very important question whether and under what restrictions (if any) these trades are to be carried on, and whether persons in the vicinity must submit to the injury thereby caused, or whether the right to purity of air is so supreme that the law will protect that right at all risks, even though trade must be entirely suspended. *Hole v. Barlow*. *Hole v. Barlow*^a was one of the first cases in which this question was raised, and it is worthy of attention (though it was subsequently overruled), as it was the first of a series of cases by which the law on this subject was eventually determined. The action was for nuisance created by brick-burning. The facts were that the plaintiff occupied a house in a newly-made road abutting upon a field belonging to the defendant, and that the defendant, preparatory to the building of certain houses, excavated clay for bricks, which he caused to be placed in three clamps for burning in the field near to the plaintiff's house, one of them being within thirty feet of it ; and it was urged on the part of the defendant that the nuisance was not actionable, as the brick-burning was in a convenient place, and not done wantonly and with intent to injure and annoy the plaintiff. Byles, J., directed the jury that to entitle the plaintiff to succeed it was not necessary that the nuisance should be injurious to health, for it was enough if it rendered the enjoyment of life and property uncomfortable, but that it is not everybody whose enjoyment of life and property is rendered uncomfortable by the carrying on of an offensive or noxious trade who can bring an action, for if that were so, the neighborhood of Birmingham and Wolverhampton, and other great manufacturing towns of

^a 4 C. B. N. S. 334 ; 27 L. J. C. P. 207. In the case of *Cavey v. Led-bitter* (13 C. B. N. S. at p. 472), Willes, J., is reported to have said that the latter part of the judgment in *Hole v. Barlow* did not seem to be correctly reported.

England would be full of persons bringing actions for nuisances arising from the carrying on of noxious and offensive trades in their vicinity to the great injury of the manufacturing and social interests of the community. The learned judge added that he apprehended the law to be that no action lies for the reasonable use of a lawful trade in a convenient and proper place, even though some one may suffer annoyance from its being so carried on. He then directed the jury that the place was convenient and proper, and that the action would not lie. The verdict was for the defendant, and a rule was obtained for a new trial, which was afterwards discharged on the ground that the direction to the jury was right. Willes, J., on the arguing of the rule, said that the common law right which every proprietor of a dwelling-house has to have the air uncontaminated and unpolluted is subject to this qualification, that necessities may arise for an interference with that right *pro bono publico* to this extent, that such interference be in respect of a matter essential to the business of life, and be conducted in a reasonable and proper manner, and in a reasonable and proper place.*

In the subsequent case of *Bamford v. Turnley*,† in the Exchequer Chamber, the decision in the case of *Hole v. Barlow*, was overruled, the court, however, being ^{*Bamford v. Turnley.*} divided in opinion. Cockburn, C. J., had directed the jury in that case, on the authority of *Hole v. Barlow*, that if they were of opinion that the spot on which the defendant had burnt his bricks was a proper and convenient spot, and that the burning of bricks under the circumstances of the case was

* In the case of *Beardmore v. Tredwell* (3 Gif. 683; 31 L. J. Ch. 892), Vice Chancellor Stuart said that the expressions used by Mr. Justice Willes in *Hole v. Barlow* are applicable to the case of public necessity only, but that it is taking too narrow a view to say that public necessity is the only ground upon which the Court of Chancery may be induced not to interfere to restrain the violation of that which was clearly in the first instance a private right.

† 3 B. & S. 66; 31 L. J. Q. B. 286. In *Cavey v. Ledbitter* (13 C. B. N. S. 470; 32 L. J. C. P. 104), Keating, J., said: "In *Bamford v. Turnley*, in the Exchequer Chamber, I, who was a consenting party, understood *Hole v. Barlow* to be overruled."

a reasonable use by the defendant of his own land, the defendant was entitled so to use his own land, and would be entitled to a verdict independently of the small matter of whether there was an interference with the plaintiff's comfort

or whether there was not. In the Exchequer Chamber, Pollock, C. B., thought this direction substantially right, and expressed his opinion that the nuisance for which an action will lie is not capable of

any legal definition which would be applicable to all actions and useful in deciding them, for that the question depended entirely upon surrounding circumstances — the place where; the time when; the alleged nuisance, what; the mode of committing it, how; and the duration of it, whether temporary or permanent, occasional or continual — so as to make it impossible to lay down any rule applicable to every case. Under the circumstances of the case, and as the jury had found that the use of the land for brick-making was a reasonable use, he thought the judgment of the court below, which had refused a rule to show cause why the verdict found for the defendant should not be set aside and a verdict entered for the plaintiff, should be affirmed. Bramwell, B., thought the judgment should be reversed on the ground that the

defendant had done that which, if done wantonly or maliciously, would be actionable as being a nuisance to the plaintiff's habitation by causing a sensible diminution of the comfortable enjoyment of it, and that that called on the defendant to justify or excuse what he had done, which he had been unable to do; he thought that the plaintiff had a *prima facie* case, and that the defendant had infringed the maxim, *Sic utere tuo ut alienum non lædas*, and could not justify his

wrong. The majority of the court — Erle, C. J., Williams, J., Keating, J., and Wilde, B. — also thought the judgment should be reversed, and these judges united in giving judgment. Their judgment was to the effect that it had been treated as a doctrine of law that as the jury had found that the spot where the bricks were made was proper and convenient, and that the burning of the bricks was a reasonable use of the land, these circumstances consti-

tuted a bar to the action ; and that as this doctrine was founded on the decision in *Hole v. Barlow*, it was a question for the consideration of the court whether that case was well decided. The decision in *Hole v. Barlow*, it was added, was plainly founded on a passage in Com. Dig. tit. Action on the Case for a Nuisance, (C.), which is in the following words : “ So an action does not lie for a reasonable use of any right, though it be to the annoyance of another ; as if a butcher, brewer, &c., use his trade in a convenient place, though it be to the annoyance of his neighbor ; ” but that no authority was cited by Comyns for this dictum, in which there was a want of precision, especially in the words “ reasonable ” and “ convenient,” which render its meaning by no means clear, and it might be doubted whether the court, in *Hole v. Barlow*, did not misunderstand it. The meaning of the word “ convenient,” as it is used by several authorities, was then considered ; and the judgment continued, that it seemed that just as the use of an offensive trade will be indictable as a public nuisance if it is carried on in an *inconvenient* place, *i. e.*, a place where it greatly incommodes a multitude of persons, so it will be actionable as a private nuisance if it be carried on in an *inconvenient* place, *i. e.*, a place where it greatly incommodes an individual ; and that if this be the true construction of the expression “ convenient ” in the passage from Comyns the doctrine contained in it amounts to no more than what has long been settled law, namely, that a man may, without being liable to an action, exercise a lawful trade, as that of a butcher, brewer, or the like, notwithstanding it be carried on so near the house of another as to be an annoyance to him in rendering his residence there less delectable or agreeable than it otherwise would have been, provided the trade be so conducted that it does not cause what amounts, in point of law, to a nuisance to the neighboring house. In *Hole v. Barlow* it was added the court appeared to have read the passage as containing a doctrine that a place may be “ proper and convenient ” for the carrying on of a trade, notwithstanding it is a place where the trade cannot be carried on without causing a nuisance to a neighbor. This was a doctrine which had

certainly never been judicially adopted in any case before, and the adoption of it would be inconsistent with the judgments pronounced in some of the cases cited at the bar during the argument of the case then under consideration, and more especially with the case of *Walter v. Selfe*.⁴ In the case then before the court, the judgment continued, the direction to the jury pointed to a further condition, namely, if the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land; it remained to see whether the doctrine adopted in *Hole v. Barlow*, if accompanied with this addition, was maintainable. If it was good law that the fitness of the locality prevents the carrying on of an offensive trade from being an actionable nuisance, it appeared necessarily to follow that this must be a reasonable use of the land; but if it was not good law, and if the true doctrine was that whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance, according to the ordinary rule of law, an action will lie whatever the locality may be, then the jury cannot properly be asked whether the causing the annoyance was a reasonable use of the land. If such a question is proper in an action for corrupting air, a similar question should be asked the jury in actions for other violations of the ordinary rights of property, *e. g.*, the transmission by a neighbor of water in a polluted condition; and so, if a right to light had been acquired, and was obstructed by a building, the question should be asked whether the obstructing building was erected in a convenient and proper place, and in the reasonable enjoyment by the defendant of his own land. Nobody had ever suggested that such questions might be put to a jury, and yet it was difficult to see why such questions should not be left to a jury if *Hole v. Barlow* was well decided. The court was of opinion that the decision in the case of *Hole v. Barlow* was wrong.

The last case on this subject to which it is necessary to direct special attention is *The St. Helen's Smelting Company*

⁴ 4 De G. & Sm. 315; 20 L. J. Ch. 433.

v. Tipping," which was taken to the House of Lords. This was an action for erecting and using copper-smelting works, by the noxious fumes from which the plaintiff's trees were killed and his cattle injured. The case was tried before Mellor, J., who directed the jury that a man has no doubt certain rights which he may exercise on his own property, and within the limit of those rights he may do any act which is not unlawful; he may, among other things, erect a lime-kiln, if it is in a convenient place, "but the meaning of the word 'convenient,'" he added, "I shall venture to interpret to you as being that it must be plain that he will not do an actionable injury to another, because a man may not use his own property so as to injure his neighbor." In his judgment in the House of Lords, Lord Westbury, C., explained that there is a difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. Whether a thing which produces mere personal discomfort is an actionable nuisance, depends greatly on the circumstance where the thing occurs, for if a man lives in a town he must submit to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large; and if a man lives in a street he cannot complain of discomfort which is caused to himself individually by the business carried on in neighboring shops; but when an occupation is carried on by one person in the neighborhood of another, and the result of that occupation is a material injury, the case is very different, for then the submission which is required in the case of mere personal discomfort is not demanded by the law.

St. Helen's
Smelting
Company
v. Tipping.

From this mass of cases and opinions of various judges it is not easy to extract precisely the law on the subject, but it seems in the first place that all the dif-

Result of
authorities.

difficulty which has arisen through the introduction of the question, whether a place where a trade is carried on is "convenient and proper" for the purpose, and whether the purpose is a reasonable use by the owner of his own land, may be put out of the question, for if a place is convenient and proper for the purpose, the purpose is a reasonable use of the land, and the use cannot be reasonable nor the place convenient and proper if an actionable injury is caused to a neighbor. This appears to be arguing in a circle, for after all, the question is, when is an injury caused by pollution of air produced by the exercise of a lawful trade actionable? To solve this it will be found material to follow the distinction pointed out by Lord Westbury in the case of *The St. Helen's Smelting Company v. Tipping*, between pollution of air which causes mere personal discomfort, and pollution of air which produces material injury to property or health. To take the latter case first, it will be found as a rule that unless a person carrying on a trade has acquired as an easement a right to pollute the air to such an extent, and in such a manner as to produce material injury to health or property, such pollution is in every case an actionable injury, and it is no justification for causing such injury to allege that it was caused by the exercise of a trade which was carried on in a convenient and proper place, and was a reasonable use by the defendant of his own land.^v If, on the other hand, mere personal discomfort is produced, those facts may justify the injury produced, but each case must depend upon its own circumstances, for every man has a right that the air shall not be polluted to such an extent, and in such a manner, as to interfere materially with the ordinary comfort of human existence,^w yet a man must not be fastidious, for the law will not allow him to

^v In *Cooke v. Forbes* (L. R. 5 Eq. 166; 37 L. J. Ch. 178) it was held that if a person manufactures goods, although of a particularly sensitive or delicate character, it is a wrongful act for another person to allow noxious fumes to be emitted from his manufactory, if the goods of the former are thereby damaged.

^w *Crump v. Lambert*, L. R. 3 Eq. 409; *Morley v. Pragnel*, Cro. Car. 510; *Walter v. Selfe*, 4 De G. & Sm. 315; 20 L. J. Ch. 433.

sue for trifling or temporary annoyance, and the locality in which he dwells must be taken into consideration in determining whether he has a right of action.²

In cases of pollution of air there is a question of public nuisances always to be remembered as well as the private rights of individuals, and it is apprehended that although pollution may have continued for twenty years so as to afford a prescriptive right against a neighbor, yet that such user affords no right against the public, and that an indictment will lie for the nuisance.¹

Pollution of air is not usually an injury for which a *reversioner* can sue, for the annoyance is in most cases of a temporary nature, affecting only the occupier of a house and causing no injury to the inheritance. The case of *Simpson v. Savage*³ was an action for pollution of air by smoke from a chimney of a factory, and it was urged, on the part of the plaintiff, who was a reversioner, that though an action for pollution of air can ordinarily be maintained by the occupier of a house only, yet in that case the reversionary estate was injured because the factory and chimney were permanent and injurious to the inheritance; but it was held the action would not lie, for the erection of the chimney alone was not an injurious or wrongful act, and if it had happened never to be used no injury could have arisen, but that it was the use made of the chimney which caused the injury, and that was the real subject-matter of complaint. It was argued, also, that the nuisance from the smoke would cause the reversion to sell for less than it would have sold had the chimney not been there, but it was held that this circumstance would not entitle the reversioner to sue, for that if it was a fact that the reversion would sell

Public nuisances.

Right of reversioner to sue for pollution of air.

² *Swaine v. Great Northern Railway Co.* 33 L. J. Ch. 399 (not elsewhere reported; *St. Helen's Smelting Co. v. Tipping*, per Lord Westbury, C., 11 H. L. C. 642; 35 L. J. Q. B. 66. See, however, *Benjamin v. Storr*, L. R. 9 C. P. 400; 43 L. J. C. P. 162.

¹ See *Commonwealth v. Upton*, 6 Gray, 473, a valuable case directly in point.

³ 1 C. B. N. S. 347; 26 L. J. C. P. 50.

for less, it was not on account of anything that had been done, but on account of the apprehension of future annoyance.

Although the circumstances of a case may be such that the court would, in its discretion, think it a case fit for the grant of an injunction to restrain pollution of air, it is always essential for the obtaining of such assistance that the party injured shall not have acquiesced in the pollution, nor have slept upon his rights; for if he shall have done so, the court will refuse an injunction, though it would probably allow him to recover damages for the injury. Acquiescence, to disentitle a person to an injunction, may be given in various ways, for not only may consent be given in express terms, but it may frequently be inferred from acts or silence. Thus, if a landowner passively suffers the owner of adjoining ground to erect a factory, the natural result of which will be that the air will be polluted when the factory is used, the court will refuse to prevent the pollution. It has frequently been decided that when works which are alleged to pollute the air have been suffered to remain for several years, that is considered such laches as to preclude a person from having relief in a court of equity, without the party will first establish his right in a court of law.¹ If, however, a landowner, by acquiescence in the erection of a factory, has lost his right to the aid of the court to prevent pollution of the air when the factory is used, he is not generally debarred, by that acquiescence alone, from obtaining its aid if it is proposed to extend the factory, or if the extent of the accustomed pollution is suddenly increased.²

LIGHT.

The right to light, like the right to the free passage of air and water, is an easement of a negative character, that is, it is not a right entitling the dominant owner to do something on the servient tenement, but it is

¹ See *Weller v. Smeaton*, 1 Cox, 102; *Reid v. Gifford*, 6 John. Ch. 19; *Dane v. Valentine*, 5 Met. 14.

² *Bankart v. Houghton*, 27 Beav. 425; 28 L. J. Ch. 473.

a right by which the servient owner is restricted from the full and ordinary enjoyment of his land ; it is a right by which the servient owner is prohibited building on his own soil in such a manner as to obstruct the windows of the dominant tenement, in consequence of which any such building becomes wrongful, and the obstruction of the light an injury for which the dominant owner may sue.^a

Obstruction of light is an injury which the law has recognized, and for which it has awarded compensation, in the shape of damages, from the earliest times, but in later years the tendency arose rather to appeal to the court of chancery to restrain obstruction of light by injunction than to sue for damages at law, inasmuch as the award of damages was, in many cases, an inadequate remedy, or inappropriate to the circumstances of the case.^b Now that the Judicature Act has amalgamated the courts and has given to the High Court of Justice the powers both of the common law and chancery courts, it may be readily imagined that the practice will commonly be to claim both damages and an injunction in every action for disturbance of easements. By acquiescence in the erection of a building, which it is probable will have the effect of interfering with light, the dominant owner will generally lose his right to an injunction, after the building is completed, on the same principle that acquiescence in pollution of air will frequently deprive a person injured of a similar remedy for that pollution ; if it should turn out, however, that the owner of a right to light was induced to acquiesce in the erection of an obstructing building, by the

Restraint
of obstruction
by injunction.

^a The distinctions that exist between the easements of free passage for light and air have already been noticed, as well as the impropriety of coupling them in actions for obstruction. See *ante*, p. 369.

^b One of the earliest cases of application to the Court of Chancery to restrain obstruction of light by injunction was *The Attorney General v. Nichol* (16 Ves. 338), in which Lord Eldon, C., said that the foundation of the jurisdiction of that court was that head of mischief alluded to by Lord Hardwicke, that sort of material injury to the comfort of the existence of those who dwell in the neighboring house requiring the application of a power to prevent, as well as remedy, an evil for which damages, more or less, would be given in an action at law.

false representation of the builder that his lights would not be obstructed when the building should be finished, he would, in all probability, not be deprived of his right to have the obstruction abated,^c and before a refusal to order a completed building to be removed the court will take into consideration the nature of the obstructing building and the other circumstances of the case, for, as it was put by the lords justices in the case of *Baxter v. Bowen*,^d the court would not allow a man to stand by while such a building as the Langham Hotel was being built up and then come and have it pulled down, but it was very different in the case then under consideration, where the obstructing building was merely an open shed of a slight and temporary character which could be removed very easily and at very little cost.

It was mentioned in a former part of this work, when the acquisition of rights to light was considered, that if a person sells a house, with windows overlooking his land, which he retains, a right to light is given to the purchaser by implied grant, and that the vendor cannot afterwards build in such a manner as to obstruct those windows; for so obstructing the light would be an act in derogation of the vendor's grant, which the law will not permit; in the event of such obstruction the purchaser may sue either for damages or an injunction.^e In a case, however, in which the owner of a house, with an ancient window, had let it by an agreement not under seal, wherein he promised to grant a lease, and had afterwards blocked up the window, the Court of Chancery refused to compel the lessor to remove the obstruction, as the bill did not ask for specific performance of the agreement to grant the lease, whereby the tenant might acquire a legal right to light, and the light could not be claimed as ancient against the lessor.^f The right to light by

^c *Davies v. Marshall*, 10 C. B. N. S. 697; 31 L. J. C. P. 61.

^d 44 L. J. Ch. 625 (not elsewhere reported).

^e *Coutts v. Gorham*, Moo. & Mal. 396; *Cox v. Matthews*, 1 Vent. 239; *Palmer v. Fletcher*, 1 Lev. 122; *Sir T. Raym.* 87; *Davies v. Marshall*, 1 Dr. & Sm. 557; *Miles v. Tobin*, 17 L. T. 432 (not elsewhere reported).

^f *Fox v. Purssell*, 3 Sm. & G. 242.

implied grant, on sale of a house apart from the adjoining land, obviously extends only to windows which were in existence at the time of the sale, and which are in the house sold; no action will, therefore, lie for obstruction of windows which have been opened subsequently to the sale, nor for obstruction of windows in buildings other than those included in the purchase, neither can the purchaser sue if he has materially altered the position of the windows; that is, if he has altered them to such a degree that they cannot be regarded as the same lights.^o

In *Hall v. Evans*,¹ in the Queen's Bench of Upper Canada, where a statute exists similar to the English Prescription Act, it was held that a right to light was lost, or rather was not acquired, if during the twenty years' enjoyment the owner of the windows had raised his building and windows so high that no part of the windows in their new situation occupied any part of the space they did before; the house being raised higher than the whole length of the windows; and the general reasoning of the case is in favor of the American rule as to prescriptive lights, except when statutes exist to the contrary.

In the recent case of *Barnes v. Loach*,² it was held that a right of light to windows in the walls of certain cottages was not lost by removing the walls farther back, and making windows in the new walls of the same size, and in the same relative positions as the old ones; nor by erecting a new wall outside of the old one, with another window in it, but leaving the old wall and window as before to receive light through the new one.

When actions or suits have been commenced for obstruction of light, various reasons have at times been assigned by way of justification for such obstruction, which have been held to afford no justification whatever.

Justification for obstructing light.

^o *Blanchard v. Bridges*, 4 A. & E. 176; 5 L. J. N. S. K. B. 73.

¹ 42 Upper Can. Q. B. Rep. 190 (1877), a valuable case on this subject.

² 4 Q. B. D. 494 (1879).

Thus, from the case of *Yates v. Jack*,^b the principle is to be derived that the circumstance of sufficient light being left for the present purpose of the owner of a house whose light is obstructed, or that many persons carry on a business similar to that conducted in the house, with a smaller amount of light than that which continues to enter the obstructed windows, forms no justification for continuing an obstruction, and no defence to an action or suit for the injury; for the right conferred or recognized by the Prescription Act is an absolute indefeasible right to the enjoyment of the light accustomed to enter the windows, without reference to the purpose for which it has been used, and a right created by express or implied grant is a right to the amount of light which was accustomed to enter the windows

at the time the grant was made. It has also been alleged as an excuse or justification for obstructing light, and as a defence in legal proceedings, that more light has been given in consequence of the alteration of the obstructing buildings in a different direction or in a different manner from that by which it was formerly derived, and also that the property in the dominant tenement has been improved by the alterations which have been effected in the neighboring houses, and that the owner himself has partially obstructed it; but all these excuses are to no purpose, and do not justify the obstruction of ancient light, for the owner of a right to light has a right to have the light uninterrupted in its ordinary mode of flowing to his windows, and undiverted from its accustomed course, and no stranger can justify the substitution of a different stream of light without the consent of the dominant owner. Independently of this the dominant owner, when a new stream of light is caused to flow to him, has no legal right to that stream, and cannot insist that it shall not be obstructed or diverted, and if the giving of such a new stream justified the obstruction of ancient light, the dominant owner might soon be deprived of light

^b L. R. 1 Ch. App. 295; 35 L. J. Ch. 539. See, also, *Martin v. Headdon*, L. R. 2 Eq. 425; 35 L. J. Ch. 602, and *Dent v. Auction Mart Co.* L. R. 2 Eq. 238; 35 L. J. Ch. 555.

altogether, for he could not resist the stoppage of the new supply.[†]

It may also be noticed that the position of an obstructing building is not a material consideration in determining whether an action will lie either for an injunction or for damages, for it matters not whether the building is opposite, at right angles, or in a position oblique, to the obstructed windows, the real and only question being whether the effect is such an obstruction as the party building has no right to cause.[‡] The position of an obstructing building may, however, have some effect on the evidence necessary to support an action, and this seems to be the only effect of such a building being so directly facing the window that has been darkened. In the case of *The City of London Brewery Company v. Tennant*,[§] Lord Selborne, C., said that he quite agreed with Lord Cranworth, in the case of *Clarke v. Clark*,^{||} that a greater amount of evidence is needed to prove a material injury to light by lateral or oblique obstruction than is necessary in a case of direct obstruction, and that more especially when the buildings to the side are not erected upon what was previously an open space, but upon a space already to a very great extent obstructed by buildings.

A question of considerable importance relating to justification for obstruction of light, and one which has given rise to much argument, it even obtaining ultimate decision in the House of Lords, is whether the fact that the owner of ancient lights has enlarged his windows, or has opened new windows, will justify the servient owner in obstructing the ancient lights if it is impossible for him, owing to the position of the enlargement or of the new windows, to obstruct them alone without at the same time obstructing the ancient lights. It has ultimately

Position of
obstruct-
ing build-
ing.

Enlarge-
ment of
ancient
lights, and
opening of
new win-
dows.

[†] *Senior v. Pawson*, L. R. 3 Eq. 330; *Straight v. Burn*, L. R. 5 Ch. App. 163; 39 L. J. Ch. 289; *Dyers' Co. v. King*, L. R. 9 Eq. 438; 39 L. J. Ch. 339; *Baxter v. Bower*, 44 L. J. Ch. 625 (not elsewhere reported).

[‡] *Attorney General v. Nichol*, 16 Ves. at p. 342.

[§] L. R. 9 Ch. App. at p. 220; 43 L. J. Ch. at p. 459.

^{||} L. R. 1 Ch. App. 16; 35 L. J. Ch. 151.

been decided that the servient owner is not, in such case, justified in obstructing the ancient lights, and it has been decided further that the court will not make it a condition for the grant of an injunction to restrain obstruction of ancient lights, that new windows or the increase of ancient windows should be blocked up;^m but as this is a question of considerable importance, and has given rise to much debate and diversity of opinion, the various decisions of the courts on the subject will be considered in succession.

The first case to be noticed is *Renshaw v. Bean*,ⁿ which was an action for obstructing light, and the facts were that the plaintiff's windows looked into a court on the opposite side of which the defendant's house was situated. The plaintiff's windows, until they were altered, were entirely ancient lights, but about eighteen years before the action the house in which they were situated had been rebuilt, and in the rebuilding some of the windows were enlarged and some were entirely altered in position, and none of the then existing windows entirely corresponded in size and situation with those in the ancient house, although they did so in part. The defendant raised his house and obstructed the light, in consequence of which the action was brought. The court gave judgment for the defendant. Lord Campbell, C. J., who delivered judgment, said that the court did not proceed upon the ground that the plaintiff, by the alteration of his windows, had entirely lost the right which he had before enjoyed of having light and air through such portions of the existing windows as formed portions of the ancient lights; but that the plaintiff had acquired nothing more in addition to his former right, and if by the alterations which he had made he had exceeded the limits of that right, and had put himself into such a position that the excess could not be obstructed by the defendant in the exercise of his lawful rights on his own land without at the same time obstructing the former right of the plaintiff, he had only himself to blame for the existence of such a state of things, and must be considered to have lost

^m *Aynsley v. Glover*, L. R. 10 Ch. App. 283; 44 L. J. Ch. 523.

ⁿ 18 Q. B. 112; 21 L. J. Q. B. 219.

the former right which he had, at all events until he should, by himself doing away with the excess and restoring his windows to their former state, throw upon the defendant the necessity of so arranging his buildings as not to interfere with the admitted right. It will be observed that in this judgment it was particularly remarked that the original right to light was not destroyed by the enlargement of the windows, but that the ground of judgment was merely that the plaintiff was himself to blame for the existing state of things, and therefore that the defendant was justified in obstructing the ancient as well as the modern lights as he could not obstruct the latter only. It will be seen presently that the former part of this judgment was in accordance with the subsequent judgment of the House of Lords on this subject, but that the House of Lords overruled this judgment on the last point.

The case of *Hutchinson v. Copestake*^o was very similar in its facts to that of *Renshaw v. Bean*, and the judgment was in effect the same, but the judgment of the court (the Exchequer Chamber), which was in favor of the defendant, was given on the ground that the ancient lights were so confused by alteration with the new portions that they could not be considered as substantially the same lights. There is, however, one portion of the judgment which should be specially noticed. It will be observed that the court treated the right to light acquired by prescription as arising by implied grant in a manner similar to other easements acquired by prescription, and in this the view of the court differed from the opinion of the House of Lords, subsequently given in another case, which will be presently noticed. The court said they had been pressed with the argument that there was no greater amount of inconvenience to the servient tenement after the enlargement of the windows than before they were altered, and a case had been cited where the master of the rolls was supposed to have held that a party having several windows in a house could put out an intermediate new window between two old ones, where no apparent detriment to the owner of the servient tenement ap-

Hutchinson v. Copestake.

^o 9 C. B. N. S. 863; 31 L. J. C. P. 19.

peared to arise therefrom. They wholly dissented from that doctrine, and thought that the right to restrict the owner of the adjoining land from building on his own land gained by user or grant must be confined to the subject-matter of such user or grant, and that the restriction on the owner of the servient tenement must be substantially the same. The court thought the owner of the old lights could not say that the new window he then put out would occasion the servient owner no harm, as he could not build so as to affect any of his lights before, and the new one would not abridge his power of building. The new light is not one of the windows to which the original assent was given, and it might be that the owner of the servient tenement would not have chosen to acquiesce if the windows had been in the situation of the new windows.

Several cases subsequently arose in which similar decisions were given, and chief among these were *Binckes v. Pash*,^p and *Jones v. Tapling*.^q Of *Binckes v. Pash* nothing further need be said, but as *Jones v. Tapling* was eventually taken to the House of Lords,^r and is the case in which the principles of law on this important point were ultimately determined, the facts may be shortly explained. Jones, the plaintiff in the court below, and respondent in the House of Lords, was a dealer in silk, carrying on business in certain premises in Wood Street, Cheapside, which abutted in the rear on property in Gresham Street in the occupation of the defendant, Tapling, who became appellant in the House of Lords. In the year 1852 Jones pulled down his premises in Wood Street and erected new warehouses, and in so doing altered the position and enlarged the dimensions of the windows previously existing, increased the height of the building, and set back the rear or back line of the warehouses. The defendant, Tapling, in the year 1856, pulled down his prem-

^p 11 C. B. N. S. 324; 31 L. J. C. P. 121.

^q 11 C. B. N. S. 283; 31 L. J. C. P. 110. Affirmed in Exchequer Chamber, the judges being much divided in opinion, 12 C. B. N. S. 825; 31 L. J. C. P. 342.

^r 11 H. L. C. 290; 34 L. J. C. P. 342.

ises in Gresham Street, and also erected new warehouses. Before the rebuilding of the defendant's premises, the plaintiff, Jones, made considerable alteration in the size and position of his ancient lights, and not only increased them, but opened new windows, and the new windows were so situated that it was impossible for the defendant to obstruct or block them up without also obstructing or blocking to an equal or greater extent some of the ancient but altered windows. The defendant in building and obstructing the new windows, therefore, also obstructed the ancient altered lights. The plaintiff, after the defendant had completed the obstructing wall of his new premises, by the advice of counsel, caused his altered windows to be restored to their original state, and the new windows to be blocked up, and he then wrote to the defendant requiring him to pull down his wall; this, however, was refused, and the action was commenced. The judges differed in opinion as to the plaintiff's right of action, both in the Court of Common Pleas and also in the Exchequer Chamber; but these judgments are not material now, as the whole theory of the right to light acquired under the Prescription Act was explained in the House of Lords to be different from what had been assumed in all previous decisions, and in fact the principles of law upon which all previous cases had been decided were overruled. It is necessary, therefore, to consider the judgments of the lords alone, and particularly that of Lord Westbury, C., who explained the true nature of the easement of light, and the principles of law by which that right and the right of action is governed. It will be remarked, however, that the whole of this judgment relates to rights to light acquired by prescription; and if, therefore, such a right is acquired by grant, actual or implied, it is presumed the principles of law expounded in the judgment would not apply to the case. His lordship, after citing the third section of the Prescription Act, which relates exclusively to the acquisition of rights to light, remarked that upon that section it was material to observe, with reference to the appeal under consideration, that the right to what is called an "ancient light" now depends upon positive enactment; that it is

matter *juris positivi* and does not require, and therefore ought not to be vested on, any presumption of grant or fiction of a license having been obtained from the adjoining proprietor, and he added that that observation was material, because he thought it would be found that error in some decided cases had arisen from the fact of the courts treating the right as originating in a presumed grant or license. It must also be observed, he continued, that after an enjoyment of an access of light for twenty years without interruption, the right is declared by the statute to be absolute and indefeasible, and that it would therefore seem that it cannot be lost or defeated by a subsequent temporary intermission of enjoyment not amounting to abandonment; and that this absolute and indefeasible right, which is the creation of the statute, is not subjected to any condition or qualification, nor is it made liable to be affected or prejudiced by any attempt to extend the access or use of light beyond that which, having been enjoyed uninterruptedly during the required period, is declared to be not liable to be defeated. Before dealing with the appeal, his lordship thought it might be useful to point out some expressions which are found in decided cases, and which seem to have a tendency to mislead. One of these expressions is the phrase "right to obstruct." If my adjoining neighbor, he continued, builds upon his land and opens numerous windows which look over my gardens or my pleasure grounds, I do not acquire from this act of my neighbor any new or other right than I before possessed. I have simply the same right that I before possessed—I have simply the same right of building or raising any erection I please on my own land, unless that right has been by some antecedent matter either lost or impaired, and I gain no new or enlarged right by the act of my neighbor. Again there is another form of words which is often found in cases on this subject, namely, the phrase "invasion of privacy by opening windows." That is not treated by the law as a wrong for which any remedy is given. If A. be the owner of beautiful gardens and pleasure grounds, and B. is the owner of an adjoining piece of land, B. may build upon it a manufactory with a hundred windows overlooking the pleas-

ure grounds, and A. has neither more nor less than the right which he previously had of erecting on his land a building of such a height and extent as will shut out the windows of the newly erected manufactory. Suppose, then, continued the lord chancellor, that the owner of a dwelling-house with a window, to which an absolute and indefeasible right to a certain access of light belonged, opens two other windows, one on each side of the old window, does the indefeasible right become thereby defeasible? By opening the new windows he does no injury or wrong in the eye of the law to his neighbor, who is at liberty to build up against them, so far as he possesses the right of building on his land; but it must be remembered that he possesses no right of building so as to obstruct the ancient window; for to that extent his right of building is gone by the indefeasible right which the statute has conferred.

After the enunciation of these important principles of law, Lord Westbury stated that he could not accept the reasoning on which the decisions in *Renshaw v. Bean* and *Hutchinson v. Copestake* were founded, for upon examining the judgments in those cases it would be seen that the opening of new windows was treated as a wrongful act done by the owner of the ancient lights, which occasioned the loss of the old right he possessed; and the courts asked whether he could complain of the natural consequence of his own act. His lordship thought two erroneous assumptions underlaid this reasoning: first, that the act of opening the new windows was a wrongful one; and secondly, that such wrongful act was sufficient in law to deprive the party of his right under the statute. But he had already observed that the opening of new windows is in law an innocent act, and no innocent act can destroy the existing right of one party, or give any enlarged right to the other, namely, the adjoining proprietor. The other lords concurred, and expressed opinions similar to that of Lord Westbury.*

* Since the decision in the case of *Tapling v. Jones*, in the House of Lords, several cases have occurred in the Court of Chancery in which the judges have doubted the soundness of the reasoning upon which that

It was mentioned in a former place that in those cases in which disturbance of an easement affects or inconveniences the occupier of a house alone, a reversioner who is in no way injured is incapable of suing either

Action by
a rever-
sioner.

judgment was based, or have restricted the application of the principles therein expounded. In *Lanfranchi v. Mackenzie* (L. R. 4 Eq. at p. 426; 36 L. J. Ch. at p. 522), Vice Chancellor Malins said he did not understand the Prescription Act to have made any difference in the principle on which rights to light are acquired by prescription, and that he only read the statute as meaning that there was no absolute period for acquisition of a right to light before the statute, but that now the period is fixed at twenty years, and that all the cases since the act was passed had been decided on the ancient principle of law. In *Heath v. Bucknall* (L. R. 8 Eq. 1; 38 L. J. Ch. 372), Lord Romilly, M. R., said: "I do not understand that *Tapling v. Jones* overrules this doctrine, laid down in the *Curriers' Co. v. Corbett*, which appears to me to be founded on immutable and incontrovertible principles of equity. *Tapling v. Jones* unquestionably decides that no alteration of an ancient light would justify the owner of the servient tenement in obstructing what remains of the ancient light, so as to exempt him from his liability to pay damages for such obstruction. But whether this obstruction is a matter to be compensated by damages only, or whether it is one which can be restrained by injunction, is, I conceive, a totally different question. It may, no doubt, be laid down as a general axiom, that where a man possesses a right to light and air over the property of a neighbor, the obstruction of which would be punishable at law in the shape of damages, a court of equity will, by injunction, prevent that obstruction; but where the owner of the ancient light so deals with it, as essentially to alter its character, to convert it into a different easement over his neighbor's land, and one which prevents him from enjoying his property as he might have done at any time before the ancient lights were so altered, then I am of opinion that the owner of the servient tenement is not debarred from the enjoyment of his land as heretofore. If, however, in obtaining such enjoyment, he unavoidably interferes with the ancient light of the owner of the dominant tenement, then the only compensation which that owner can obtain is in the shape of damages. He is still entitled to compensation for the obstruction of that which he formerly enjoyed, but, by reason of his own act, he has deprived himself of the right to call upon a court of equity to assist him." The doctrine thus broadly laid down by Lord Romilly, M. R., was not approved by Lord Justice Giffard as being applicable to all cases in equity; for commenting upon that case in *Straight v. Burn* (L. R. 5 Ch. App. at p. 166; 39 L. J. Ch. at p. 290), he said: "That leaves only the other part of the case which has been argued, namely, the authority of *Heath v. Bucknall*. With respect to that case I cannot take it as having been decided other-

at law or in equity. It is on this ground that a reversioner is, in most cases, incapable of suing for obstruction of light, for the injury thereby caused is generally an injury to the occupier of a house alone. In the case of *Wilson v. Townend*,¹ Kindersley, V. C., said that there is no doubt that the ground of the jurisdiction of the Court of Chancery in cases of obstruction of light is the interference with the personal convenience and comfort of the persons occupying the house to which a right to light is appurtenant; he thought, however, that exceptions to this rule might arise, and that the case then before the court was one of those exceptions on the ground that the value of the dominant tenement would be materially diminished by the continuance of the obstruction, and consequently that the court was justified in interfering at the suit of a reversioner. So, also, in the case of *The Metropolitan Association v. Petch*,² it was held that the erection of a hoarding by which light was obstructed might be sufficient to give a right of action to a reversioner, for that the injury

wise than upon its particular circumstances; those particular circumstances, as I gather them, being, that a very small and almost inappreciable proportion of the ancient window was preserved, and the rest was new; so that there would have been no material damages at law. But if this case is supposed to lay down the proposition that a plaintiff, who according to *Tapling v. Jones*, has clear legal rights, cannot come to this court and get protection for those rights, I entirely demur to such a conclusion. If, for instance, there is a house with three ancient windows, and it is desirable to add at no great distance from those three ancient windows two other windows, is it to be said that because those two other windows are to be placed in that position, the plaintiff is not to come into court to preserve what has been decided in *Tapling v. Jones* to be his clear legal right? Such a conclusion would not be either according to principle, or to the course of this court. I take the course of this court to be, that when there is a material injury to that which is a clear legal right, and it appears that damages from the nature of the case would not be a complete compensation, this court will interfere by injunction." So, again, in *Aynsley v. Glover*, L. R. 10 Ch. App. 283; 44 L. J. Ch. 523, it was held that the Prescription Act did not take away any of the modes of claiming easements, including rights to light, which existed before that act.

¹ 1 Dr. & Sm. 324; 30 L. J. Ch. 25.

² 5 C. B. N. S. 504; 27 L. J. C. P. 330.

might be of a permanent character, and therefore injurious to the reversionary estate, but whether the hoarding was of such a permanent character as really to produce injury to the reversioner, and enable him to maintain his action, was a question of fact which must be determined by a jury. The argument by which the vice chancellor, in *Wilson v. Townend*, arrived at his decision, that he ought to grant an injunction at the suit of the reversioner, and that the objection of the defendant to the jurisdiction of the court ought not to prevail, was to the effect, that supposing it happened, as it does happen in many cases, that the house which had the ancient lights stood upon the very verge of the owner's ground, there would be nothing, if the defendant's objection were to prevail, to prevent him, if his ground came up to the wall of the house, from building a dead wall within six inches of the whole of the windows, and so completely blocking up the whole of the light; and he felt very great difficulty in coming to the conclusion, that in such a case the Court of Chancery would say, "You must go to law and get your damages, and this court will not interfere." It would seem, however, that there is no real difficulty on the point, and that the rule must be the same in cases of obstruction of light as in cases of disturbance of other easements; if an obstruction is merely temporary, the occupier of the house is alone injured, and he alone can sue for damages, for actual injury is necessary to support an action on the case; so also he alone can sue for an injunction, for the foundation for that remedy is the interference with his personal comfort; if, on the contrary, the obstructing object is permanent, the reversionary estate is injured, for the right to light may be annulled unless the obstruction is destroyed; the right of the reversioner is therefore injured, and he can sue either for damages or for an injunction, for he, as well as the occupier, sustains damage from the obstruction.

If a person with a limited interest in a house to which a right to light is appurtenant applies to the court for an injunction to restrain the obstruction of his light,

Applica-
tion for in-
junction by

it seems that the court will restrain the obstruction merely during the continuance of his interest, and not perpetually.^v person with limited interest.

If a building by which light is wrongfully obstructed is in the occupation of a tenant, and not of the owner of the soil, it would seem that an action for the obstruction may be maintained against the tenant if he erected the building, for he was guilty of a wrongful act when building in such a manner as to obstruct the light; but the case would appear to be different if the building was erected before the tenancy commenced, for then the tenant cannot be said to have committed a wrongful act, and it would be an act of waste if he were to remove the building. So, if an action has once been maintained against the tenant for erecting a building whereby he has obstructed light, no second action can be brought against him successfully for continuing the obstruction, for he cannot remove the building.^w Right of action against a tenant for obstructing light.

In order that a person whose light is obstructed may maintain an action it is generally essential that he should have sustained substantial injury from the loss of light, for the court will not interfere in every case of trifling inconvenience or injury. This is a rule which has been recognized frequently, and from very early times, both in the courts of common law and chancery—for instance, in *Dent v. The Auction Mart Company*,^x in which several of the authorities were mentioned. In that case Vice Chancellor Wood said: “In these cases, which of late have been extremely frequent, the old doctrine, which was established by Substantial injury requisite to support an action.

^v *Simper v. Foley*, 2 John. & H. 555.

^w *Arnold v. Jefferson*, Holt, 498. See, however, *Rosewell v. Prior*, 2 Salk. 460.

^x L. R. 2 Eq. 238; 35 L. J. Ch. 555; *Attorney General v. Nichol*, 16 Ves. 338; *Jackson v. Duke of Newcastle*, 33 L. J. Ch. 698; *Parker v. Smith*, 5 C. & P. 438; *Wells v. Ody*, 7 C. & P. 410; *Pringle v. Wernham*, 7 C. & P. 377; *Back v. Stacey*, 2 C. & P. 465; *Arcedeckne v. Kelk*, 2 Gif. 683; *Robson v. Whittingham*, L. R. 1 Ch. App. 442; 35 L. J. Ch. 223; *Beadel v. Perry*, L. R. 3 Eq. 465; *Morris v. Lessees of Lord Berkeley*, 2 Ves. 452; 3 Ves. 404.

Lord Eldon in *The Attorney General v. Nichol*, seems in substance never to have been departed from. . . . The doctrine established in *The Attorney General v. Nichol*, and recognized by Lord Westbury in the more recent cases of *Jackson v. Duke of Newcastle*, and other cases, was this: 'There are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained, or an action upon the case, which, however, might be maintained in many cases which would not support an injunction.' In that one sentence is contained the whole of the doctrine which of late has been recognized as governing this court in its decisions; though it is not always easy to apply that doctrine when it has been enunciated. First of all, it is necessary to ascertain what it is that will at law support a claim for damages in respect of an injury done to a building by the obstruction of light and air; and the authority to which I would refer in preference to any other upon this subject is the summing up of Chief Justice Best in the case of *Back v. Stacey*, because that summing up has been approved of by the lords justices in a recent case before their lordships. The chief justice told the jury, 'In order to give a right of action and sustain the issue there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable, *and* to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done.' With the exception of reading *or* for *and* I apprehend that the above statement correctly lays down the doctrine in the manner in which it would now be supported in an action at law." There are cases, however, in which the courts will interfere when the obstruction of light is very slight, and the injury sustained is trifling, but these are very rare and depend upon exceptional circumstances." It was remarked by Vice Chancellor Wood, in the passage above cited from his judgment in *Dent v. The Auction Mart Company*, that it is not always easy to apply the doctrine there referred to when it has been enunciated. The truth seems to be that in each case the decision must de-

pend upon the circumstances, and that it is impossible to lay down any infallible rule by which it may be determined whether the injury sustained is sufficient to induce a court to interfere or a jury to award damages.

It is here necessary to notice the effect of a covenant for quiet enjoyment. It has been shown* that no grant of a right to light is to be implied from the mere covenant for quiet enjoyment usually inserted in deeds of conveyance of buildings with windows, but it was held by the master of the rolls that the effect of a covenant for quiet enjoyment following a grant of light among the general words of a deed of conveyance is to render the grantee entitled to an injunction to restrain interference with his light, however slight that interference may be, and that substantial injury to his right is not a material consideration in determining his right to an injunction in such a case, but this decision was overruled by the lords justices on appeal. The lord justices first considered whether any greater right than the ordinary easement was passed by the terms of the deed under their notice. That deed first conveyed a piece of ground with the warehouses, tenements, and appurtenances, and then contained the general words including "all lights, easements, advantages, and appurtenances thereto belonging, or in anywise appertaining," and the court thought that no greater right passed to the grantee by those words than the ordinary right to light which is commonly acquired by prescription. Mellish, L. J., then said that the next question was, Did the covenant for quiet enjoyment make any difference? He said he had no hesitation in saying that nothing could be clearer than that in a court of law the covenant for quiet enjoyment in its plain, ordinary terms did not increase or enlarge the rights which were granted by the previous part of the conveyance, though it would of course be possible to insert in any covenant words which would increase the rights of the covenantee to damages if his rights were violated, or would entitle him to an injunction to enforce his right. It had been argued that the covenant for quiet enjoyment was

Covenant
for quiet
enjoyment.
Proof of
substantial
injury.

* *Ante*, p. 179.

broken by the obstruction of the light as it was accustomed to enter the windows at the time of the grant, however slight the obstruction might be, and the covenant being broken that the grantee was entitled to an injunction to restrain such violation, although he might not be able to prove sufficient injury to entitle him to damages in a court of law, but the Court of Appeal held that that was not so, and that there was no difference in the amount of damage which would entitle a person to maintain an action at law, and that which would entitle him to file a bill in equity notwithstanding the covenant for quiet enjoyment. The conclusion, therefore, to be derived from this case as to the effect on the ordinary easements granted by a deed of conveyance, of the common covenant for quiet enjoyment is, that it has no effect whatever except perhaps to give a remedy by action on the covenant in addition to or in lieu of the ordinary remedy by action on the case (if the expression may still be used) for interference with the right, but in any case substantial injury must be proved.^a

The difficulty of determining whether a building in course of erection would, when completed, be of such a character as to cause a substantial diminution of light to an ancient window opposite to it, and whether a case was such as to warrant a grant of an injunction, gave rise to an attempt to establish a rule or guiding principle that if the obstructing wall would not when finished be of such a height as to prevent the light falling on to the window at an angle of forty-five degrees, there would not be sufficient ground to infer that the light would be materially obstructed, and that the case would not be one in which the building should under ordinary circumstances be restrained. This principle was set on foot by the late Vice Chancellor, Sir John Stuart, who said that it seemed to him that where, opposite to ancient lights, a wall is built not higher than the distance between the wall and the ancient lights, there cannot, under ordinary circumstances, be such a material obscuration of the ancient lights as to make it nec-

Light prevented falling at an angle of forty-five degrees : substantial injury.

^a *Leech v. Schweder*, L. R. 9 Ch. App. 463; 43 L. J. Ch. 477.

essary for the Court of Chancery to interfere by injunction. He added that the Metropolitan Building Act is framed on the principle that the height of a building on the opposite side of a street should not exceed the breadth of the street, that is, if the street be forty feet wide, the height of the building on the opposite side must not exceed forty feet. He also said that he had had the means of ascertaining from one of the most eminent judges of the common law courts that, as a general proposition, the courts of law are now disposed to take this view.^b This proposition has given rise to a considerable amount of discussion, and various cases have been argued in which it has been urged as a hard and fast rule of law; it is thought, however, unnecessary to wade through all the cases in which the subject has been considered, but that it is sufficient to refer to one or two of the most recent as they will show in what light the principle has come to be regarded. In the case of *The City of London Brewery Company v. Tennant*,^c Lord Selborne, C., said that there is no positive rule of law upon the subject, and that the circumstance that forty-five degrees are left unobstructed is merely an element in the question of fact whether the access of light is unduly interfered with; but, he added, undoubtedly there is ground for saying that if the legislature, when making general regulations as to buildings, considered that when new buildings are erected, the light sufficient for the comfortable occupation of them will as a general rule be obtained if the buildings to be erected opposite to them have not a greater angular elevation than forty-five degrees, the fact that forty-five degrees of sky are left unobstructed may, under ordinary circumstances, be considered *prima facie* evidence that there is not likely to be material injury.

If obstruction of light produce no immediate injury to the owners of ancient windows owing to the circumstance that they are making use of the house to which the windows belong in a manner which does

Possibility
of future
injury.

^b *Beadel v. Perry*, L. R. 3 Eq. 465.

^c L. R. 9 Ch. App. 212; 43 L. J. Ch. 458; *Hackett v. Baiss*, L. R. 20 Eq. 494; 45 L. J. Ch. 13; *Theed v. Debenham*, 2 Ch. D. 165.

not render the full stream of the accustomed light necessary, it is a question whether the court will restrain the obstruction, on the ground that damage to a great extent may be sustained at a future time if the premises are applied to a different purpose. From the decision in the case of *Jackson v. The Duke of Newcastle*,^a it would seem that the court will not restrain the obstruction of light when no immediate injury is sustained, because there is a possibility of injury at a future time, but it is questionable if this is good law. The circumstances of that case were, that the window in question belonged to a small room at the back of a grocer's shop, which was called the counting-house, and was used for keeping the shop books. The obstruction caused no material injury while the room continued to be used for a counting-house, but Lord Westbury, C., who, as well as the master of the rolls, appears to have personally made an examination of the premises,^c said he was sensible that it was quite possible the premises might thereafter be applied to another purpose, and made applicable to a different business in which the proposed abridgment of light and air would operate most materially to the prejudice of the owners; the question, therefore, was whether he could interfere by way of injunction when that injunction would be founded not upon the extent of present injury requiring that interference, but upon an injury which, having regard to a future possible destination of the premises, might materially affect their value. He could not find that the question had been anywhere determined. The ground of the jurisdiction, when stated, is always stated with this accompaniment, that it must be an injury for which damages at law can be obtained. If he regarded the injury for which damages at law could be obtained, it would be the injury done simply to the counting-house by the proposed diminution of light, a diminu-

^a 33 L. J. Ch. 698 (not in the Reports).

^c The practice of a judge going to inspect premises was expressly disapproved of by Jessel, M. R., in *Leech v. Schweder*, L. R. 9 Ch. 463; 43 L. J. Ch. 232, when a formal application was made to him to inspect the premises in question. Several reasons were given against the practice.

tion which he believed would still leave the light quite sufficient for all the purposes to which the room was then applied. It was perfectly true that the premises, when they ceased to be a grocer's shop, might be converted into a jeweller's shop, where the sunshine and the light at the back of the premises, received through the window of the counting-house, might be of the greatest possible value in the conduct of that business, or they might be applied for a silk-mercator's shop, when the requisite quantity of light for the purpose of distinguishing colors, and the shades and hues of color, might be of the greatest importance. The obstruction might, therefore, injure the premises thereafter, but for the present injury the court would not be justified in interfering by injunction, and though both a tenant and reversioner might apply for an injunction, he apprehended that in each case the application must be founded upon the present existing injury, and that future possibilities could not be speculated upon by the court. The injunction which had been granted by the master of the rolls was, therefore, dissolved. In concluding his judgment, it should be remarked that the lord chancellor said that he had had considerable difficulty in arriving at his conclusion, which certainly he was aware might stop short, in point of the exercise of jurisdiction, of that which the reason of the case would require if he could have found any authority to warrant him in going the length that he thought it would be reasonable to go; but that he had found nothing which authorized him to look into the possible future, or to speculate about the future condition of the premises, and he was obliged, therefore, to confine his right of interference to that which the exigency of the present circumstances justified and rendered necessary.

A few remarks are to be made upon this decision. The point there decided was said by Lord Westbury to be decided for the first time; but assuming that the basis of that decision was sound, and that the possibility of injury at a future time, if the premises should happen to be used for a different purpose, ought not to be taken into consideration, ought not the injunction to have been granted on a different ground? It

has been shown^f that the general rule, which may be deduced from the various cases decided on the subject of obstruction of light, is, that a prescriptive right to light is a right to that amount of light which has been accustomed to enter a window *irrespective of the purposes for which it may have been used*, and therefore, that though no actual injury was sustained from the darkening of the counting-house window, yet is it not a fact that the *right* to the light was injured to such an extent that either the occupier of the premises or a reversioner might have sued? If it is true that a prescriptive right to light is of the extent above mentioned, then surely any obstruction of the light accustomed to enter, which would render the room unfit for any ordinary purpose to which it might be put, and for which it was adapted with the window as it then was, was an injury to the *right* for which an action or suit would lie. It has also been shown^g that it is no answer to an action for obstruction of a light to say that sufficient light is left for the present purposes of the occupier of the house; but did not this decision uphold a contrary doctrine, that if sufficient light was left for present purposes no action could be maintained for an obstruction? In *Aynsley v. Glover*,^h Jessel, M. R., expressed his opinion that the decision in *Jackson v. The Duke of Newcastle* was wrong, and that it was in conflict with the decision in *Yates v. Jack*.ⁱ

And doubtless this is the better law, for in the late case of *Moore v. Hall*¹ it was held that in an action for obstruction of light, the jury may, in assessing damages, take into consideration the fact that the use to which the plaintiff's premises are put may reasonably be expected to be altered in the future to a use for which they will require the whole flow of light to which they are entitled. Manisty, J., said: "If a man has a prescriptive right to light for certain windows, he loses none of his right by enlarging those windows; he still

^f *Ante*, chapter III. p. 289.

^g *Ante*, p. 386.

^h L. R. 18 Eq. 544; 43 L. J. Ch. 777.

ⁱ L. R. 1 Ch. App. 295; 35 L. J. Ch. 539.

¹ 3 Q. B. D. 178; 26 Weekly Rep. 401.

has a right to the same flow of light, and it matters not to what use he may put it. The jury may therefore contemplate his requiring his prescriptive flow of light for other purposes than those for which he at present uses it. By using the same flow of light to a greater extent the service of the servient tenement is not increased or diminished. Cockburn, C. J., added: "The measure of damages has nothing to do with the use to which the premises are being put at the time. Let us take a practical case. Suppose a man builds a house and opens windows, the owner of a tenement against which he is gaining a prescriptive right to light does not consider for what purpose the light is being or will be used; nor when the right is gained does he consider it. *Martin v. Goble*, 1 Camp. 320, was decided on a wrong principle. If you change the use of the light from a superior to an inferior use, say from a mansion to a factory, it cannot be said that, because in the second use you require less light than formerly, the owner of the servient tenement will have any power to obstruct your light to the extent of the difference between the light formerly and now required for the progress of the building. The true measure of damages is the diminution in value of the premises. How can that be ascertained? The rooms which are now used as bedrooms may, in a very short time, be required for some other purpose for which they will want all the light which had, previously to the erection of defendant's building, flowed in. In estimating damages, the jury may fairly take into consideration whether the house will probably be continued to be used in the same way, or whether there is a reasonable probability that in the hands of either its present or future owner it may be used in some other way. If this was not so, we should have a varying rule and continual actions." ¹

¹ In *Martin v. Goble*, 1 Camp. 320, referred to and dissented from by the chief justice, it was said: "It was not enough that the windows were to a certain degree darkened by this wall, which the defendant had erected on his own ground. The house was entitled to the degree of light necessary for a malt-house, not for a dwelling-house. The converting it from the one into the other could not affect the rights of the owners of the adjoining ground. No man could, by any act of his, suddenly impose a

Besides the before-mentioned remedies for obstruction of light, there is one which the law will sanction, though it is rarely employed, and is of a dangerous character. The obstructing object may be removed by the person whose right is injured. It is dangerous, however, to employ this remedy, for the tendency of such a course is to lead to riot and trespass, and it is, therefore, much to be avoided. Referring to this mode of remedy in the case of *Hyde v. Graham*,^j Pollock, C. B., said: "No doubt, in Blackstone's Commentaries, some instances are given where a person is allowed to obtain redress by his own act, as well as by operation of law, but the occasions are very few, and they might constantly lead to breaches of the peace; for if a man has a right to remove a gate placed across the land of another, he would have a right to do it, even though the owner was there and forbade him. The law of England appears to me, both in spirit and in principle, to prevent persons from redressing their grievances by their own act." Notwithstanding this, however, it has, in olden cases, been held that the owner of ancient lights may himself abate an obstruction erected on the servient tenement. Salkeld reports that, "If H. builds a house so near mine that it stops my lights, or shoots the water upon my house, or is any other way a nuisance to me, I may enter upon the owner's soil and pull it down; and for this reason only a small fine was set upon the defendant in an indictment for a riot in pulling down some part of a house, it being a nuisance to his lights and the right found for him in an action for stopping his lights."^k The right to abate an obstruction to light is also recognized by Chief Justice Holt;^l

new restriction upon his neighbor. This house had for twenty years enjoyed light sufficient for a malt-house, and up to this extent and no farther, the plaintiffs could still require that light should be admitted to it. The question, therefore, was whether if it still remained in the condition of a malt-house, a proper degree of light for the purpose of making malt was now prevented from entering it by reason of the wall which the defendant had erected."

^j 1 H. & C. at p. 598.

^k *Rex v. Rosewell*, 2 Salk. 459.

^l *Arnold v. Jefferson*, Holt, 498.

for he said, in a case in which the action would not lie, that the plaintiff might himself abate the nuisance, but he also added that while doing it the plaintiff *must stand upon his own ground!*

IN AMERICA,

the easement of light not being generally recognized, except in cases of express grant, the instances of injunctions against obstructing lights are not frequent; but wherever the right is duly acquired, the remedy at law or in equity is resorted to and applied.¹ Thus, in *Janes v. Jenkins*² an action was sustained upon this state of facts. In that case A., the owner of two adjoining lots, called the east and west lots, leased the east lot for ninety-nine years, with a covenant that the lessee might make openings, and place lights in the wall which he contemplated erecting on the west line of said lot. The wall was erected and lights placed in it overlooking the west lot, which A. subsequently conveyed to B. Subsequently to the erection of the wall, and the last deed to B., A. sold the east lot to C., by a deed containing this clause: with "all and every the rights, alleys, ways, waters, privileges, appurtenances, and *advantages* to the same belonging or in any wise appertaining." The deed of the west lot to B. contained a special covenant of warranty, and in an action thereon for an alleged breach by reason of the existence of the wall on the east lot, overlooking the other, whereby the grantee was prevented from building on the same, it was held that the owner of the east lot had acquired by his grant a right to maintain the wall and windows, and overlook the other lot, and the case of *Story v. Odin*³ was cited and approved. Perhaps the peculiar phraseology of the grant in this case may have aided in arriving at the conclusion, but the court seems to fully adopt the broad English doctrine.

In *Clawson v. Primrose*, in the Court of Chancery of Delaware,⁴ an injunction was granted by Chancellor Bates, to re-

¹ See *Doyle v. Lord*, 64 N. Y. 432.

² 34 Md. 1.

³ 12 Mass. 157.

⁴ 24 Am. Law Reg. 6; Jan. 1876. And see the very valuable note to the case by Sidney Biddle, Esq., of the Philadelphia Bar.

strain the erection of a building by the defendant on a vacant lot adjoining the plaintiff's house, whose windows had overlooked the defendant's lot for over thirty-five years, and the chancellor, in an elaborate judgment, adopted the English common law as to the acquisition of a right to light by prescription. So the same result was reached in *Robeson v. Pit-tenger*,¹ in the Court of Chancery of New Jersey, in 1838. There S., owning two lots, built a dwelling-house on one "immediately on the line of" the other, with six windows, which opened and received light and air from the other. The house came into the possession of the plaintiff, and the other lot into that of the defendant, who purposed to erect a building thereon which would darken the plaintiff's windows. The plaintiff obtained an injunction against the same, partly upon the ground that the windows had existed for more than twenty years, and partly because "the adjoining lot was owned by the man who built the house and subsequently sold it to the plaintiff."

In *Brummell v. Wharin*² the owner of two adjoining shops in the principal street of Toronto, leased one of them to the plaintiff, with all "the privileges and appurtenances thereto belonging or used therewith." One "privilege" so used was that the front window, having also a side view in which to display goods, had been long used for that purpose, and was a valuable privilege. Subsequently he leased the other shop to the defendant, who placed a show case at the doorway of his shop, which interfered with the view from the plaintiff's window. He was held liable to an injunction from continuing such obstruction, principally on the case of *Riviere v. Bower*.³

¹ 1 Green Ch. R. 57. And see *Kay v. Stallman*, 2 Weekly Notes, 643. But probably the right itself would not now be recognized in New Jersey upon that state of facts. See *Hayden v. Dutcher*, 4 Stew. N. J. Eq. 217; and the very late case of *Rennysen v. Rozell*, Sup. Ct. of Penn. Jan. 7, 1880.

² 12 Grant's (U. C.) Ch. R. 283 (1866).

³ Ry. & Mood. 24.

SUPPORT.

Many questions of difficulty have of late years arisen relative to the cases in which a party who has sustained damage from the removal of support from his land or buildings is in a position to sue the person by whom the damage has been caused ; and in this respect it will be found that the principles of law which apply in the case of natural rights are somewhat different from those which apply in the case of easements or acquired rights to support.

With reference to the natural right of support, every landowner has *primâ facie* an unqualified right to support for his land from the adjacent and subjacent soil, although it may be the property of another person, and the dominant owner is therefore entitled to sue him if he, without justification, removes or excavates in his own soil to the detriment of the dominant land ; and this is the case, although the operation of excavating or removing the soil has not been conducted negligently, or in a manner contrary to the custom of the country where the land is situated.^m

Right to sue for disturbance of natural rights to support.

The natural and unqualified right to support, however, to which all landowners are entitled, is a right, as has already been explained, not to any particular means of support, but merely that the use and enjoyment of the dominant estate in its natural condition shall not be abridged by any act of the servient owner in his own soil, and the existence of this right cannot operate as a restriction upon the servient owner to prevent him excavating so long as the dominant tenement is not disturbed. On the other hand, the natural right cannot be increased by the dominant owner, as, for instance, by placing an artificial weight on the land by the erection of buildings, for no man can, by his own act, impose a new burden on his neighbor, and therefore if *buildings* are erected, the servient owner cannot be held responsible at law, if he by excavating, as he lawfully might had the buildings

Effect of erecting buildings.

^m *Humphries v. Brogden*, 12 Q. B. 739; 20 L. J. Q. B. 10; *Brown v. Robins*, 4 H. & N. 186; 28 L. J. Exch. 250.

not been there, causes the buildings to fall: thus it was said by Lord Tenterden, C. J., in *Wyatt v. Harrison*,ⁿ that it may be true that if my land adjoins that of another man, and I have not by building increased the weight upon my soil, and my neighbor digs in his land so as to occasion mine to fall in, he may be liable to an action; but if I have laid an additional weight upon my land it does not follow that he is to be deprived of the right of digging his own ground because mine will then become incapable of supporting the artificial weight which I have laid upon it. It is true that a doubt has been expressed whether the natural right to support from *subjacent* soil does not extend to buildings erected on the surface of the ground,^o but this idea is not sufficiently supported by authority to be considered law, and is inconsistent with the above-mentioned principle that no man can by his own act impose a new burden on his neighbor. Though, however, the erection of houses on land cannot saddle the servient owner with a greater obligation not to remove supporting soil than that to which he was subject before they were built, yet the servient owner is not by the fact of newly erected buildings increasing the weight on his soil relieved from any part of his former obligation, and if the land of the dominant owner sinks, by reason of excavation in the servient tenement, *not in consequence of the additional weight imposed on the surface*, but just as it would have sunk had no houses been erected, the servient owner will be held liable, not only for the damage to the land, but also for the consequential damage caused to the newly-erected houses.^p

IN AMERICA,

the prevailing rule seems to be, notwithstanding the English cases of *Brown v. Robins* and *Stroyan v. Knowles*, that if the land and buildings of the plaintiff both fall into an excava-

ⁿ 3 B. & Ad. 871; 1 L. J. N. S. K. B. 237.

^o *Rogers v. Taylor*, 2 H. & N. 828; 27 L. J. Exch. 173.

^p *Brown v. Robins*, 4 H. & N. 186; 28 L. J. Exch. 250; *Stroyan v. Knowles*, 6 H. & N. 454; 30 L. J. Exch. 102. But see *Smith v. Thackerah*, L. R. 1 C. P. 564; 35 L. J. C. P. 276.

tion wrongfully made by the defendant, for want of lateral support, if the plaintiff has only the *natural* right of support for his soil, and has not acquired any more extensive right for the support of buildings, he can recover only for damages to his *land*, and cannot include any loss for buildings or improvements on the land, such as fences, trees, shrubs, &c.¹ And even in England it has been held since *Brown v. Robins* and *Stroyan v. Knowles*, that no action will lie for the fall of land and buildings, unless some actual perceptible damage is done to the *land*, without the buildings, even though the jury find that the land would have fallen had there been no buildings upon it.² The weight of American authority is in favor of the general principle that no action will lie for injury to *buildings*, by excavating adjoining vacant land, unless the plaintiff has acquired a right to such support by grant or prescription, or unless he has been guilty of negligence in making his excavation.³

In *Thurston v. Hancock*,⁴ which was decided in 1815, and is the leading American case on this subject, the plaintiff in 1802 bought a parcel of land upon Beacon Hill in Boston, bounded on the west by land of the town of Boston; and in 1804 built a brick dwelling-house thereon, with its rear two feet from this boundary, and its foundation fifteen feet below the ancient surface of the land. The defendants in 1811 took a deed of the adjoining land from the town, and began to dig and remove the earth therefrom, and, though notified by the plaintiff that his house was endangered, continued to do so to the depth of forty-five feet, and within six feet of the rear of

¹ *Gilmore v. Driscoll*, 122 Mass. 199. There may be some question whether an ordinary fence will so increase the weight of land as to prevent a recovery therefor. See *O'Neil v. Harkins*, 8 Bush, 651.

² *Smith v. Thackerah*, L. R. 1 C. P. 564.

³ See *Panton v. Holland*, 17 John. 92; *McGuire v. Grant*, 1 Dutcher, 356; *Richardson v. Vermont Central Railroad*, 25 Vt. 465; *Lasala v. Holbrook*, 4 Paige, 169; *Richart v. Scott*, 7 Watts, 460; *Radcliff v. Mayor of Brooklyn*, 4 Comst. 195; *Mitchell v. Mayor*, 49 Ga. 19; *City of Quincy v. Jones*, 76 Ill. 231; *Shrieve v. Stokes*, 8 B. Monr. 453; *Charless v. Rankin*, 22 Mo. 566.

⁴ 12 Mass. 220.

the plaintiff's house, and thereby caused part of the earth on the surface of the plaintiff's land to fall away and slide upon the defendant's land, and rendered the foundations of the plaintiff's house insecure, and the occupation thereof dangerous, so that he was obliged to abandon it.

The court, after advisement, and upon a review of the earlier English authorities, held that the plaintiff could recover for the loss of or injury to the soil merely, and not for the damage to the house ; and Chief Justice Parker, in delivering judgment, said : " It is a common principle of the civil and of the common law, that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it. The law, founded upon principles of reason and common utility, has admitted a qualification to this dominion, restricting the proprietor so to use his own, as not to injure the property or impair any actual existing rights of another. *Sic utere tuo ut alienum non lædas.*" " But this subjection of the use of a man's own property to the convenience of his neighbor is founded upon a supposed preëxisting right in his neighbor to have and enjoy the privilege which by such act is impaired." " A man, in digging upon his own land, is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor, if he digs too near his line ; and if he disturbs the natural state of the soil, he shall answer in damages ; but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon or near the line by his neighbor." " The plaintiff built his house within two feet of the western line of the lot, knowing that the town, or those who should hold under it, had a right to build equally near to the line, or to dig down into the soil for any other lawful purpose. He knew also the shape and nature of the ground, and that it was impossible to dig there without causing excavations. He built at his peril ; for it was not possible for him, merely by building upon his own ground, to deprive the other party of such use of his as he should deem most advantageous. There was no right acquired by

his ten years' occupation, to keep his neighbor at a convenient distance from him." "It is, in fact, *damnum absque injuria*."

Upon the facts of that case, it was questionable whether the acts of the defendant would not have caused the falling away of the plaintiff's land if no house had been built thereon; and yet the court held the plaintiff not to be entitled to recover any damages for the fall of his house, without regard to the question whether the weight of the house did or did not contribute to the fall of his soil into the pit digged by the defendant. Forty years afterwards, the decision in *Thurston v. Hancock* was followed and confirmed.¹

With reference to buildings the owner has not *prima facie* any right to support either from the subjacent or adjacent soil or from adjoining buildings, and the owner of those buildings is, therefore, not in a position to sue for damage sustained in consequence of the removal of support unless he can prove that he has acquired a right that the injured building should be supported either by prescription or under a grant. If the dominant owner has acquired and can prove the existence of such a right, his position is very similar to that of the owner of a natural right to support, and he can sue the servient owner for any unjustifiable disturbance of his right. That disturbance of the right to support may be justified in certain cases there can be no doubt, though cases of the kind are probably rare. In the case of *Murchie v. Black*,² the action was brought to recover compensation for damages alleged to have been sustained by reason of the defendant having caused the plaintiff's house to fall by removing lateral support, and it appeared that the plaintiff's house and the defendant's land had been purchased from the same vendor, at the same time, and by the conditions of sale the defendant was required to build on his land in a particular manner; it was shown that it was through the excavation which was necessary for building in the manner prescribed that the support was removed from the plaintiff's house, which afterwards fell down; it was therefore

Right to sue for disturbance of support to buildings.

¹ *Foley v. Wyeth*, 2 Allen, 131.

² 19 C. B. N. S. 190; 34 L. J. C. P. 337.

said that the vendor sold the land to the defendant under a contract by which it was obligatory on him to do that which brought down the plaintiff's house, and consequently that the stipulation in the contract justified the defendant in doing that which would otherwise have formed a cause of action.

It was pointed out above that if a person entitled to support for land by natural right erects buildings, and on the owner of neighboring land digging sustains damage from removal of support which would not have been received had he not imposed the artificial weight on the land, the neighbor is not liable for the damage; so also if a right to support for a building of a particular weight has been acquired as an easement, the servient owner is not responsible for damage occasioned to that building when he excavates in his own land, and removes the accustomed support, if the dominant owner has increased the weight of his building by adding new erections, and if it was solely in consequence of the increase of weight that the damage occurred.^r If, however, the dominant owner has increased the weight of his buildings and the excavation by the servient owner is of such a character that the house must have fallen in any event, even though the weight had not been increased, it does not seem to be clear whether the dominant owner has a cause of action or not. From the principle of law in the case of natural rights to support above mentioned, that the servient owner is not by the fact of newly erected buildings increasing the weight on his soil relieved from any part of his former obligation, so that he is still liable in the event of the dominant owner's land sinking by reason of the excavation in the servient tenement, provided the sinking would have occurred had no additional weight been imposed, it would seem that if the dominant owner increases the weight of a house for which he is entitled to support, and the servient owner excavates in such a manner that the house must have fallen in any event, even though the weight of the house had not been increased, the law would hold the servient owner responsible for the damage. There is, however, no direct authority

Effect of
increasing
the weight
of build-
ings.

^r Murchie v. Black, 19 C. B. N. S. 190; 34 L. J. C. P. 337.

in support of this principle, but, on the contrary, in the case of *Murchie v. Black*, Willes, J., is reported to have said: "Assuming the plaintiff to have had the right to the support of the adjoining land, I think he lost it by what my lord has adverted to" (that is, by the fact of his having added to his house and increased the weight on the servient tenement). "This is not like the case of ancient lights, but an additional weight placed upon an old wall, and thereby the entire building must be treated as one weight; just as if a carpenter were to make a table capable of sustaining one hundred weight, and a person were to put half a ton upon it, and the table were to break in consequence of the increased pressure, could any complaint be made against the carpenter?"

It may be taken, then, that an owner of buildings cannot maintain any action for removal of support against the owner of the adjacent or subjacent soil, until he has by some means acquired a right to support for his buildings. This, however, is not the case if a wrong-doer — a person who has no right in the soil — interferes with it, and by removing the support causes the buildings to fall: for, in such case, an action will lie against him at the suit of the owner of the damaged buildings, even though the latter has not acquired any right to support. This was determined in two cases, in which there is no reason to suppose that the persons who removed the support were actually wrong-doers, but the form of the pleadings was such that for the purposes of the actions the Court of Exchequer was of opinion that they must be taken to have been wrong-doers.* In *Jeffries v. Williams*, the earliest of these cases, the declaration alleged that the houses injured belonged to the plaintiffs, and that the defendant so wrongfully, carelessly, negligently, and improperly, and without leaving any proper or sufficient support in that behalf, worked certain mines under ground near and contiguous to, and under the premises, that the houses were injured. The court thought that the declaration was sufficient. It had been objected that the declaration

Right of
action
against a
wrong-doer
for removing
support.

* *Jeffries v. Williams*, 5 Exch. 792; 20 L. J. Exch. 14; *Bibby v. Carter*, 4 H. & N. 153; 28 L. J. Exch. 182.

contained no allegation that the plaintiffs had any right to have the premises supported by the soil under which the defendant got the minerals, but the court said that if it had appeared in the declaration that the soil in which the mines were was the defendant's, or that the defendant had the right to get the minerals, the objection would have been fatal, because, arguing against a person having the right to the adjoining soil, it would be necessary for the plaintiffs to show a title to the support of the soil; but if the defendant is not stated in the declaration to have any such right, and is therefore *primâ facie* a wrong-doer, the declaration would be sufficient. If, it was continued, a house is *de facto* supported by the soil of a neighbor, that appeared to the court to be a sufficient title against any one but that neighbor, or one claiming under him; just as a person who had propped a house up by a shore resting on his neighbor's ground would have a right of action against a stranger who, by removing it, caused the house to fall, though he would not have such a right against the neighbor, or one authorized by the neighbor to do so, if he were to take it away and cause the same damage.

Until the decision in the case of *Bonomi v. Backhouse* 'in the House of Lords, it was a point of some doubt when a cause of action arises if support is destroyed; whether a dominant owner can sue immediately support is removed, or whether he has no right of action till he has sustained damage in consequence of the servient owner's act. It will be seen that this point is not one of such difficulty as it at first sight appears, if the nature of the right to support is borne in mind, and if the character of the action which is brought is remembered. Previously to this decision, it had been held that if the support to land or houses to which the owner is entitled is removed, a cause of action arises immediately on such removal, although no damage may happen to ensue, on the ground that the removal of the support is an injury to a right." This decision, however,

¹ *Bonomi v. Backhouse*, in Exchequer Chamber, E., B. & E. 646; 27 L. J. Q. B. 378; in House of Lords, 9 H. L. C. 503; 34 L. J. Q. B. 181.

" *Nicklin v. Williams*, 10 Exch. 259; 23 L. J. Exch. 335.

was overruled in *Bonomi v. Backhouse*, Willes, J., who delivered the judgment of the Court of Exchequer Chamber, observing that no authority is cited in *Nicklin v. Williams* for the judgment there given, and that, although that judgment is distinct upon the point, it nevertheless was extrajudicial; it was then decided, the decision being affirmed in the House of Lords, that if the means of support to which an owner of land or buildings is entitled, is removed, a cause of action arises when damage is actually sustained, and not immediately upon the removal of the support. The question in *Bonomi v. Backhouse* arose with reference to the statute of *Bonomi v. Backhouse*. limitations, for the defendant, more than six years before the commencement of the action, had worked some coal mines, but no actual damage had occurred till within six years before the suit, and the question consequently arose whether the statute was an answer to the action — or, in other words, whether the cause of action accrued within the six years? On account of the importance of this case, and the explanation of the nature of the right to support therein contained, portions of the judgment of the court are subjoined. After stating the question in the cause, Willes, J., continued: “The right to support of land, and the right to support of buildings, stand upon different footings as to the mode of acquiring them — the former being *primâ facie* a right of property analogous to the flow of a natural river or of air,” “whilst the latter must be founded upon prescription or grant express or implied; but the character of the rights when acquired is in each case the same. The question in this case depends upon what is the character of the right; viz., whether the support must be afforded by the neighboring soil itself, or such a portion of it as would be, beyond all question, sufficient for present and future support, or whether it is competent for the owner to abstract the minerals without liability to an action unless and until actual damage is thereby caused to his neighbor. The most ordinary case of withdrawal of support is in town property, where persons buy small pieces of land frequently by the yard or foot, and occupy the whole of it with buildings. They generally excavate for cellars, and in all

cases make foundations ; and in lieu of support given to their neighbor's land by the natural soil, substitute a wall. We are not aware that it has ever been considered that the mere excavation of the land for this purpose gives a right of action to the adjoining owner, and is itself an unlawful act, although it is certain that if damage ensued a right of action would accrue. So, also, we are not aware that, until the case of *Nicklin v. Williams*, it had ever been supposed that the getting coals or minerals, to whatever extent, in a man's own land, was an unlawful act ; although, if he thereby caused damage to his neighbor, he was undoubtedly responsible for it. The right of action was supposed to arise from the damage, not from the act of the adjoining owner in his own land. The law favors the exercise of dominion by every one upon his own land, and his using it for the most beneficial purpose to himself." After remarking that the effect of the defendant's contention, if true, would be that whenever a mine was worked the worker would at once be subjected to actions by all the surrounding owners — who, indeed, would be compelled to sue in self-defence if there was any reasonable ground to suppose that the working would in time produce damage to their property, and that in many cases damages would be given where none could be sustained, while they would in other cases be given where they ought to be withheld, the judgment continued : " There is no doubt that for an injury to a right an action lies ; but the question is, What is the plaintiff's right ? Is it that his land should remain in its natural state, unaffected by any act done in the neighboring land, or is it that nothing should be done in the neighboring land from which a jury would find that damage might possibly accrue ? There is no doubt that in certain cases an action may be maintained, although there is no actual damage. The rule laid down by Serjeant Williams in note (2) to *Mellor v. Spateman* (1 Wms. Saund. 346 *b*) is, that whenever an act injures another's right, and would be evidence in future in favor of the wrong-doer, an action may be maintained for an invasion of the right, without proof of any specific damage. This is a reasonable and sensible rule ; but it has no applica-

tion to the present case ; for the act of the defendant in getting the coal would be no evidence in his favor as to any future act ; getting the coal was an act done by him in his own soil by virtue of his dominion over it. If the question was unaffected by decision, we cannot but think that the contention on the part of the plaintiffs in error is correct. That on behalf of the defendant is that the action must be brought within six years after the excavation is made, and that it is immaterial whether any actual damage has occurred or not. . . . On the other hand, the plaintiffs in error rely upon the ordinary rule that *damnum* and *injuria* must concur to confer a right of action, and that, although only one action could be maintained for damage in respect of such a claim, nevertheless it would be essential that some damage should have happened before a defendant was made liable for an act done on his own land. . . . We are not insensible to the consideration that the holding damage to be essential to the cause of action may extend the time during which persons working minerals and making excavations may be made responsible ; but we think that the right which a man has is to enjoy his own land in the state and condition in which nature has placed it, and also to use it in such a manner as he thinks fit, subject always to this — that if his mode of using it does damage to his neighbor, he must make compensation. Applying these two principles to the present case, we think that no cause of action accrued for the mere excavation by the defendant in his own land, so long as it caused no damage to the plaintiff ; and that the cause of action did accrue when the actual damage first occurred.” The judgment of the Court of Exchequer Chamber was affirmed in the House of Lords, Lord Cranworth remarking that it had been supposed that the right of the party whose land was interfered with was a right to what was called “ the pillars,” or the support ; but that his real right was to the ordinary enjoyment of his land, and till that was interfered with, he had no cause of complaint.

In the case of *Lamb v. Walker*,¹ recently decided by the Queen’s Bench Division of the English High Court of Jus-

¹ 3 Q. B. D. 389 ; 38 L. T. Rep. N. S. 643 (1878).

tice, the plaintiff sued the defendant for injury to plaintiff's buildings by mining operations of defendant on his own lands. A special referee found that in addition to the injury already incurred, the plaintiff would incur injury in the future, and assessed the prospective damages at £150. It was held by a majority of the court that such damages were recoverable. Manisty, J., who delivered one of the prevailing opinions, states that where no injury has accrued in a case of this kind, prospective damages are not recoverable. So long as plaintiff's right to have his land and house supported by the adjoining strata is not interfered with, he has no cause of action, but as soon as the support which was left proved insufficient, defendant's act in withdrawing the necessary support became wrongful, and *damnum* and *injuria* concurring, plaintiff's cause of action accrued. The defendant contended that if this was so the true measure of damage was the injury actually done up to the time of the commencement of the action, and the remedy for subsequent injuries was by actions from time to time as the injuries should accrue. But the answer to this was that it is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all, and that in this case there was but one cause of action.¹

The principle established by *Nicklin v. Williams* was, in fact, recognized many years previously in the case of *Roberts v. Read*,^v and it was then even carried

Time to
sue if it is
limited

¹ The leading case cited on this subject was *Bonomi v. Backhouse*, 9 H. L. 503, where it is held that no cause of action arises in respect to what a man does on his own land until actual damage arises therefrom to the property of the adjoining owner. In this case, when in the lower court (E., B. & E. 638), it was said that "where a right of action is thus vested, and an action is brought for the act alleged to have occasioned the injury, the damages given by the jury for that act must be taken to embrace all the injurious consequences of that act, unknown as well as known, which shall arise thereafter, as well as those which have arisen; for the right of action is satisfied by one recovery." See, also, as sustaining the same view, *Nicklin v. Williams*, 10 Exch. 259; *Hamer v. Knowles*, 6 H. & N. 454.

^v 16 East, 215; *Gillon v. Boddington*, 1 C. & P. 541.

farther than in the case of *Bonomi v. Backhouse*. from the commission of an act.
 The action in the case of *Roberts v. Read* was brought by the plaintiff against certain surveyors of highways, for excavating in a road and causing a wall to fall. The excavation in the road was made in the month of May, 1810, but the wall did not fall till the 31st January, 1811, and it was therefore objected by the defendant that the action, which was commenced on the 13th April, 1811, was brought too late, as it was enacted by a certain statute under which the defendants had acted, that "if any action shall be commenced against any persons for anything *done or acted* in pursuance of this act, such action shall be commenced within three calendar months *after the fact committed*, and not afterwards:" but the court held that it was sufficient that the action was commenced within three months after the wall fell, for that was the gravamen, and that the consequential damage was the cause of action in the case. If, it was added, the action had been for trespass, it must have been brought within three months after the act of trespass complained of, but being an action on the case for the consequential damage, it could not have been brought till the specific wrong had been suffered, and that only happened within three months before the action was brought.

It was remarked in a former part of this work, that railway and other companies which purchase land without the subjacent mines under the peculiar powers conferred by the Lands and Railways Clauses Consolidation Acts, or under other acts of a similar character, are not in the position of ordinary purchasers of land, and do not acquire that right to support for the surface land from the subjacent minerals to which ordinary purchasers become entitled by implied grant or of natural right.^w In consequence of this, railway companies who, after proper notice from the mine-owner according to the terms of the act, refuse to purchase the mines, are incapable of suing for injury to their lines if the subjacent minerals are subsequently excavated in the usual and proper manner, and

Lands and
Railways
Clauses
Acts.

Right to
sue for dis-
turbance of
support.

^w *Ante*, chapter II. p. 225.

sinking is produced by the removal of the support. It is obvious that as this is the effect of statute, that result is produced only when the purchase is effected under the above-mentioned acts, and those of a precisely similar character, and that in cases of purchase under special acts of parliament, the right to support and to sue for disturbance depends entirely upon the form of words employed in the act under which the land is taken. The reason for the peculiar effect of the Lands and Railways Clauses Acts above-mentioned was explained when the subject was previously noticed, and the cases in which this principle of law was determined were given, but it may be observed that in the case of *The London and North Western Railroad Company v. Ackroyd*,^x it was determined that the above-mentioned effect of the acts is not confined solely to cases of purchase of land, but extends also to the case of a tunnel made under land, when no land is actually purchased, but a mere right of boring through the soil and running trains under the ground.

It is unnecessary to enter at any length into the consideration of those cases which have arisen under private and special acts of parliament, for the construction put upon such acts can apply only to those particular statutes, and any others which may chance to contain the same forms of words; the principles enunciated in those cases cannot, therefore, be of value as being capable of general application.^y

WATER.

The wrongs that can be committed against persons who possess water-rights, consist (1) of diversion of the water of streams before it reaches the land of the injured person; (2) obstruction or penning back of

Disturb-
ance of wa-
ter-rights.

^x 31 L. J. Ch. 588 (not in the Reports).

^y See *Regina v. Aire and Calder Navigation Co.* 30 L. J. Q. B. 387 (not in the Reports); *Stourbridge Canal Co. v. Earl of Dudley*, 3 E. & E. 409; 30 L. J. Q. B. 108; *Dudley Canal Co. v. Grazebrook*, 1 B. & Ad. 59; 8 L. J. K. B. 361; *Midland Railway Co. v. Checkley*, L. R. 4 Eq. 19; 36 L. J. Ch. 380; *Metropolitan Board of Works v. Metropolitan Railway Co.* L. R. 3 C. P. 612; 37 L. J. C. P. 281; in *Exchequer Chamber*, L. R. 4 C. P. 192; 38 L. J. C. P. 172.

the water of streams so as to flood the land past which the water has flowed; or to lessen the current of the stream; (3) disturbance of the steady flow and regular current of water; (4) disturbance of the right to take water, either of a stream, pool, or well, for use; and, lastly, (5) pollution of water, whether flowing or standing, and whether above or under ground.

Some doubt has existed whether an action will lie for diversion or obstruction of the water of a natural stream at the suit of a riparian owner, who has not applied the water to any purpose of utility, and who consequently cannot prove any actual damage from such diversion or obstruction. This subject has already been noticed at the commencement of this chapter, when it was pointed out that no action on the case will lie unless damage has been sustained, and that all or nearly all actions for disturbance of easements and natural rights are necessarily actions on the case, and therefore require that evidence of damage shall be produced; but it was also shown that if the disturbance is any injury *to the right*, that alone is sufficient damage to support the action. Acts causing diversion or obstruction of the water of streams are generally committed, not upon the soil of the dominant owner so as to constitute a trespass, but upon other soil higher up or lower down the stream than his land; and if the wrongful act was actually committed upon his soil, it is clear the dominant owner would sue, not for the injury to his easement or natural right, but for the trespass on his land. In the case of injury by pollution of the water of a stream, it is questionable whether an action will not lie immediately the pollution can be detected, although no actual injury is caused, for the very fact of sending filthy matter with water on the land of another person, is a trespass on his land as much as if heaps of cinders were thrown into his garden, and this seems to have been the opinion of Sir J. Romilly, M. R., in the case of *Goldsmid v. The Tunbridge Wells Improvement Commissioners*.² In the case of rights to support, it has been shown that an action will not

Damage necessary to support an action for obstructing and diverting a stream.

² L. R. 1 Eq. at p. 169; 35 L. J. Ch. at p. 93.

lie for disturbance till actual damage has arisen, but then the nature of that right must be born in mind ; it must be remembered that the right is not a right to any *particular means* of support but that the enjoyment of land shall not be disturbed by the removal of support, also that the servient owner does no unlawful act by digging in his own soil as long as he causes no injury to his neighbor, and that he can acquire no fresh right against his neighbor by so digging, nor in any way abridge his neighbor's rights. In the case of diversion or obstruction of the water of streams, however, there is this difference : if the stream is natural, riparian owners have a natural right that the water shall be suffered to flow continuously without diminution or alteration, and any act of obstruction or diversion, though committed off the riparian owner's land, would, in process of time, if unopposed, establish an adverse easement against him ; and his natural right would be curtailed ; and similarly if the stream is artificial, acts of obstruction or diversion of the water would, if suffered to continue, form evidence in opposition to any easement which a riparian owner may have acquired, and thus a direct injury would be inflicted upon him. Notwithstanding, therefore, the older authorities in which a contrary opinion appears to have prevailed, it seems now to be established that an action will lie at the suit of a riparian proprietor for diversion or obstruction of the water of a natural stream, even though he has not been in the habit of using the water, and has sustained no actual damage, because such diversion or obstruction is an injury to his right.^a

^a *Sampson v. Hoddinott*, 1 C. B. N. S. at p. 611; 26 L. J. C. P. at p. 150; *Crossley & Sons (Limited) v. Lightowler*, L. R. 3 Eq. at p. 296; L. R. 2 Ch. App. at p. 483; *Bickett v. Morris*, L. R. 1 H. L. Sc. 47. The contrary doctrine was held in *Wright v. Howard*, 1 Sim. & St. 190; 1 L. J. Ch. 94; *Mason v. Hill*, 3 B. & Ad. 304; 1 L. J. N. S. K. B. 107; *Williams v. Morland*, 2 B. & C. 910; 2 L. J. K. B. 191. In *Elwell v. Crowthor* (31 Beav. 163; 31 L. J. Ch. 763), the Court of Chancery restrained the working of a mine under a stream in such a manner as to interfere with the supply of water to a mill, although no damage had at the time resulted from the sinking of the ground.

THE AMERICAN AUTHORITIES

fully sustain the proposition that any *unreasonable* diversion or use of running water gives a riparian proprietor below a right of action, even without any proof of prior use, or of any actual damage sustained; and on the plain ground that any *such* diversion is the invasion of a right, which if continued for a sufficient length of time may ripen into an adverse right, and thus deprive the owner below of some future use or benefit of the stream, to which he was naturally entitled.

Such unreasonable use may consist in the amount so diverted, or in the time and manner of such diversion; the question of reasonableness or unreasonableness being for the jury in each particular case; and possibly the relative great injury to the proprietor below, and the small advantage to the one above, may have some influence in given cases upon that question.

In *Newhall v. Ireson*¹ the defendant had diverted by a pipe a large portion of the entire volume of the water of a brook which ran through the plaintiff's land below, and conducted said water across the road to other land and mills of the defendant, from which it was discharged into the salt water below the plaintiff, and never returned to the stream. This was held an unreasonable diversion, and an encroachment on the plaintiff's right, giving a cause of action for nominal damages, though the plaintiff had no mill on the stream, and did not use the water for any purpose.

On the other hand any *reasonable* diversion or use of water does not give a cause of action, even if actual damage has been suffered; and for the simple reason that no man has a

¹ 8 Cush. 595. See, also, *Stowell v. Lincoln*, 11 Gray, 434; *Butman v. Hussey*, 12 Me. 407; *Munroe v. Stickney*, 48 Me. 462; *Woodman v. Tufts*, 9 N. H. 88; *Tillotson v. Smith*, 32 N. H. 90; *Norway Plains Co. v. Bradley*, 52 N. H. 86; *Branch v. Doane*, 18 Conn. 233; *Crooker v. Bragg*, 10 Wend. 260; *Hulme v. Shreve*, 3 H. W. Green, 116; *Pastorius v. Fisher*, 1 Rawle, 27; *Alexander v. Kerr*, 2 Rawle, 83; *Plumpleigh v. Dawson*, 1 Gilman, 551.

right to *all* the water naturally running in a stream, but only to the *residuum* left after the reasonable wants of upper proprietors are satisfied; if, therefore, he sustains damage by such a reasonable diversion, it is *damnum absque injuria*.

A fortiori, can he sustain no action for such reasonable diversion without proof of actual perceptible damage? ¹

Diversion of a stream cannot in general have any injurious effect against a riparian owner whose land is situated lower down the stream than the point of diversion if the water is reconducted to the stream before it reaches his land, and if the quantity of water is not sensibly diminished; under such circumstances, therefore, no action or suit can be maintained by the riparian owner for the diversion.^b In *Embrey v. Owen*^c it was held that no action can be maintained by a riparian proprietor for diversion of water for the purpose of irrigating land if the water is returned to the stream before reaching the plaintiff's land with no other diminution in quantity than that necessarily caused by absorption of the soil, provided the amount consumed is not unreasonable so as to exceed the natural right of every riparian owner to use the water as it flows past his ground. If, however, a right to a watercourse is granted by deed, and the channel of the stream through the grantor's land is specified in the deed, the grantor may not alter the course of the stream in his own land even though the water is returned to its original course before it reaches the land of the grantee, and though the grantee sustains no damage from the alteration.^d

¹ *Elliot v. Fitchburg Railroad Co.* 10 Cush. 191. This case has sometimes been thought to be in conflict with that of *Newhall v. Ireson*, in the same court, in 8 Cush. 595, and perhaps the brief marginal note of the reporter may give some countenance to such an opinion; but when carefully examined, it will be seen that the decision itself turned upon the fact that under the particular circumstances the diversion was not unreasonable, and so no cause of action existed either with, or without, proof of damage.

^b *Elmhirst v. Spencer*, 2 Mac. & G. 45.

^c 6 Exch. 353; 20 L. J. Exch. 212.

^d *Northam v. Hurley*, 1 E. & B. 665; 22 L. J. Q. B. 183; *Whitehead v. Parks*, 2 H. & N. 870; 27 L. J. Exch. 169.

It has been shown that it is not the character of an easement that an obligation should be cast on the servant owner by which he is compelled to do an act, but that an easement merely obliges him not to do something on his own land, or to permit something to be done there by another person; nevertheless an obligation may be lawfully cast upon a landowner by which it is rendered compulsory upon him to do something for the advantage of another person, as that he shall repair fences or mend a road, but such an obligation is not an easement. Among other things, there may be an obligation cast upon a person through whose land a watercourse runs that he shall cleanse the course and keep it free from obstruction for the benefit of a lower riparian owner, and if such an obligation exists he is generally responsible for injury caused by every obstruction, however it may have been produced, and even though he removed the obstacle as soon as he became aware of the obstruction.*

Obligation to keep a stream free from obstruction.

In an old case^f it was held that an action for obstruction of a natural stream would lie at the suit of a riparian owner, although the act by which the obstruction was caused was committed before he became possessed of his estate. This was decided on the ground that it is not material when the nuisance was erected, for he that is hurt by it shall have an action. The case, however, might have been decided on another ground, namely, that a natural right appurtenant to the land was injured, and that the action would lie at the suit of any owner of the land, and, consequently, of that right, at any time until a right to obstruct the water had been acquired by prescription.

Obstruction before the possession of a person who sues.

As a general rule an action will lie against a person who continues a nuisance as well as against one who creates it, provided he has power to prevent its continuance. In the case of *Saxby v. The Manchester, Sheffield and Lincolnshire Railway Company*,^g it was

Right of action for continuing the obstruction of a stream.

* *Bell v. Twentyman*, 1 Q. B. 766.

^f *Westbourne v. Mordant*, Cro. Eliz. 191.

^g L. R. 4 C. P. 198; 38 L. J. C. P. 153.

held, however, that under the circumstances of the case the action would not lie against the defendants for continuing a nuisance which consisted of a weir erected in a stream, the soil of which belonged to the defendants, by means of which the water was obstructed from flowing to the plaintiff's print-works. The evidence showed that the soil of the stream belonged to the defendants, and that the weir was built before they became possessed of it, that they did not desire its continuance but refused to remove it, although they gave permission to the plaintiff to remove it if he pleased. It was argued that the railway company were responsible for continuing the obstruction, but it was decided otherwise, for that the act complained of was not an act done by the defendants or by any one authorized by them, nor was it an act done for their benefit or adopted by them. It was also said that they were not bound to risk the consequences of removing the weir, which might be serious, as they might involve a conflict with the persons who erected it, and the plaintiff could not shift the responsibility on to the defendants as they, the defendants, having assented, might have removed the weir themselves.

IN AMERICA,

the doctrine is familiar that every continuance of a nuisance is a *new* nuisance, and another action lies for every *day's* continuance.¹ And if the author of the nuisance leases or conveys the land or dam which creates the nuisance, he still remains liable for any damage caused by the same state of facts existing when he conveyed.²

In such cases an action will lie, either against the author of the nuisance, or against him who knowingly continues it on his land after his purchase thereof; but if the latter does no act himself to continue the nuisance, a notice or request to remove it is necessary in order to make him liable.³

¹ See *Staple v. Spring*, 10 Mass. 74; *Hodges v. Hodges*, 5 Met. 205.

² *Waggoner v. Jermaine*, 3 Denio, 306; *Curtice v. Thompson*, 19 N. H. 471; *Eastman v. Amoskeag Man. Co.* 44 N. H. 156.

³ See *Woodman v. Tufts*, 9 N. H. 88; *Pillsbury v. Moore*, 44 Me. 157; *Branch v. Doane*, 17 Conn. 418; *Johnson v. Lewis*, 13 Conn. 303; *Noyes*

As the law will sanction the abatement of a building which wrongfully obstructs light, so it will permit a person who is injured by the obstruction of a watercourse to enter his neighbor's land and remove the obstruction.¹ It is not, however, desirable that this remedy should be pursued for the same reasons that were given when the right to abate obstructions to light were considered, and the law does not favor this mode of obtaining redress for private injuries. Nevertheless, though this remedy may be pursued, Lord Holt says that an obstruction in a river may not be abated until it has actually become a nuisance,² and that a riparian owner is not justified in entering his neighbor's land and removing an obstruction in a stream merely because he anticipates injury which, in fact, may never occur.³

Right to
abate ob-
struction
of streams.

Disturbance of the steady flow and regular current of the water of a natural stream is an injury for which a riparian owner may sue, although the quantity of water is not diminished, for his natural right is that the water shall be suffered to flow in its usual and accustomed manner, and in its ordinary course. A declaration, therefore, which charged a defendant with damming up

Disturb-
ance of the
steady
flow of a
stream.

v. Stillman, 24 Conn. 15; *Howe Scale Co. v. Terry*, 47 Vt. 109; *Pierson v. Glean*, 2 Green, 36; *Carleton v. Redington*, 21 N. H. 291. See, however, that notice is not necessary, *Brown v. Cayuga and Susq. R. R. Co.* 2 Kern. 492.

¹ See *Hodges v. Raymond*, 9 Mass. 316; *Colburn v. Richards*, 13 Mass. 420; *Prescott v. White*, 21 Pick. 341; *Prescott v. Williams*, 5 Met. 429; *Heath v. Williams*, 25 Me. 209; *Brown v. Chadbourne*, 31 Me. 26; *Groton v. Haines*, 36 N. H. 388; *Gleason v. Gary*, 4 Conn. 418; *Dimmet v. Eskridge*, 6 Munf. 308; *Amoskeag Man. Co. v. Goodale*, 46 N. H. 56. The abatement should be made so as to do the least practicable injury to the other party. *Veazie v. Dwinel*, 50 Me. 496; *Moffett v. Brewer*, 1 Iowa, 348; *Gates v. Blincoe*, 2 Dana, 158; *White v. Chapin*, 12 Allen, 522. Therefore if a mill-owner has a right to maintain a dam at a certain height, and unlawfully raises it above that height, a person whose land is overflowed may abate the excess, but has no right to entirely demolish the dam. *Dyer v. Depui*, 5 Whart. 584. And see *Great Falls Co. v. Worster*, 15 N. H. 439; *Wright v. Moore*, 38 Ala. 593.

² But see *Amoskeag Man. Co. v. Goodale*, 46 N. H. 56.

³ *Rex v. Wharton*, Holt, 499.

and diverting the water of a stream and preventing it from running in its accustomed channel to the plaintiff's mill, and likewise with damming up and diverting the water and preventing it from flowing in sufficient quantities as it had been used to flow, was supported by evidence that the defendant had erected a dam by which the water was diverted from its usual course, though it was returned to its accustomed course before reaching the plaintiff's mill, and that the effect of the diversion was occasionally to delay the plaintiff in working his mill by the detention of the water.ⁱ In the case of *Robinson v. Lord Byron*,^j the Court of Chancery granted an injunction, that remedy being asked to restrain Lord Byron from preventing water flowing to a mill, or letting a greater quantity of water than usual flow down to the mill. It appeared in that case that since the 4th April, 1785, Lord Byron, who had large pieces of water in his park supplied by the stream which flowed to the mill, had at one time stopped the water and at another time let in the water in such quantities as to endanger the safety of the mill, and the lord chancellor therefore granted an injunction to restrain the defendant from using dams and other erections, "so as to prevent the water flowing to the mill in such regular quantities as it had ordinarily done before the 4th of April," but he declared at the same time that the court would not restrain any mode of user which had been enjoyed for twenty years. The same principle was followed also in the Scotch case of *Bickett v. Morris*.^k The appellant and respondent owned property on the opposite banks of a river. The appellant wished to build a certain distance on to the bed of the stream and the respondent consented, but he began to build in a manner not agreed to by the respondent, who took proceedings against him in the Court of Session to have it declared that the appellant had no right to erect buildings on the *solum* of the river beyond the line agreed upon. The court decided

ⁱ *Shears v. Wood*, 7 Moore, 345; 1 L. J. C. P. 3; *Williams v. Morland*, 2 B. & C. 910; 2 L. J. K. B. 191.

^j 1 Bro. C. C. 588.

^k L. R. 1 Sc. App. 47.

that a riparian proprietor is not entitled to erect a building or make any changes in the *alveus* of a stream without the consent of the opposite proprietor, for if he does so, although the opposite proprietor may be unable to prove that any damage has actually happened to him by the erection, yet, if the encroachment is not of a slight and trivial but of a substantial description, the alteration must always involve some risk of injury. Lord Benholme said: "Without my consent (*i. e.*, the consent of the proprietor of the other side of the river) you are not to put up your building in the channel of the river, for that, in some degree, must affect the natural flow of the water. What may be the result no human being with certainty knows, but it is my right to prevent your doing it, and when you do it, you do me an injury, whether I can qualify damage or not." Lord Neaves said: "Neither can any of the proprietors occupy the *alveus* with solid erections without the consent of the other, because he thereby affects the course of the whole stream. The idea of compelling a party to define how it will operate upon him, or what damage or injury it will produce, is out of the question." Lord Chelmsford, C., on the appeal to the House of Lords, after citing these passages, said: "These views appear to me to be perfectly sound in principle and to be supported by authority. The proprietors upon the opposite banks of a river have a common interest in the stream, and although each has a property in the *alveus* from his own side to the *medium filum fluminis*, neither is entitled to use the *alveus* in such a manner as to interfere with the natural flow of the water. My noble and learned friend, the late lord chancellor, during the argument put this question: 'If a riparian proprietor has a right to build upon a stream, how far can this right be supposed to extend? Certainly (he added) not *ad medium filum*, for if so, the opposite proprietor must have a legal right to build to the same extent from his side.' It seems to me to be clear that neither proprietor can have any right to abridge the width of the stream, or to interfere with its regular course; but anything done *in alveo* which produces no sensible effect upon the stream is allowable." Lords Cranworth and Westbury expressed simi-

lar views, and the appeal was dismissed. But in America this doctrine has been expressly denied, unless the erection of such building actually causes practical damage to the other party, or must naturally do so.¹ Though this is the general law as to the right of action for disturbing the steady and regular flow of a stream, no action can be maintained against an owner of land adjoining the sea who erected groynes for the protection of his land from the force of the waves, and has thereby caused the water to flow with increased violence on to the land of another person ; for it is said, the sea is a common enemy, against which every person has a right to protect his own land regardless of his neighbors, who in their turn must adopt any precautions which seem to them desirable for the same purpose ;¹ but though this rule has been laid down in the case of the sea, it has not been allowed in the case of tidal rivers.^m

A right to take water either from a stream or from a pool or well for use or consumption, may be disturbed Disturb-
ance of the
right to
take water
for use. either by the destruction of the supply or by pollu-
tion of the water, and generally any person who has
a right so to take water and is disturbed in either of
those ways, has a remedy by an action either for damages or
an injunction for the wrong he has sustained ; he cannot usu-
ally maintain an action for disturbance of a trifling character
or for disturbance which is merely temporary,ⁿ but if the dis-
turbance is calculated in any way to call his right in question,
it matters not how trifling or temporary the disturbance is, he

¹ See the interesting case of *Norway Plains Co. v. Bradley*, 52 N. H. 108, and the able opinion of Judge Foster.

¹ *Rex v. Pagham Commissioners*, 8 B. & C. 355 ; 6 L. J. K. B. 338.

^m *Attorney General v. Earl of Lonsdale*, L. R. 7 Eq. 377 ; 38 L. J. Ch. 335.

ⁿ *Taylor v. Bennett*, 7 C. & P. 329 ; *Goldsmid v. Tunbridge Wells Improvement Commissioners*, per Sir G. J. Turner, L. J., L. R. 1 Ch. App. at pp. 354, 355. It has been shown that there is no natural right, and that no right can be acquired by prescription to the uninterrupted flow of underground water, which percolates through the soil in unknown channels ; no action will therefore lie for destruction of a supply of water to a well so obtained.

will be entitled to sue. If the right to take water is of a public character and is not a private easement, an action will not lie unless the plaintiff has sustained some special and peculiar damage from the disturbance which is not shared by other people, just as an action will not lie for obstruction of a highway in the absence of special and peculiar injury. In the case of *Rex v. The Bristol Dock Company*,^o therefore, it was held that an inhabitant of a town who had been in the habit of taking water from a river, but without any other right than that which was common to all other inhabitants of the town and of the public generally, could not maintain an action for pollution of the water, for the wrong was public and the remedy was by indictment. But in *Harrop v. Hirst*^p it was held that an action would lie for disturbance of a right to take for use at the suit of one of a particular class of persons who had a customary right to take water from a stream for use in their houses, for an indictment would not lie against the disturber, and there was no other remedy. In that case it was in evidence that the inhabitants of the district of Tamewater possessed a customary right to take water for use in their houses as it flowed from a spout in a public highway, and that the defendant, who was owner of the watercourse through which the water flowed to the spout, had abstracted the water before it reached the spout in such quantities as to render what remained insufficient for the exigencies of the inhabitants. It was held that the plaintiff, who was one of the inhabitants, could maintain his action, although no actual personal and particular damage was proved to have been sustained by him. It was so decided on the authority of *Westbury v. Powel*, which is cited in the case of *Fineux v. Hovenden*,^q where it was determined that the inhabitants of Southwark, having had a common watering-place, and the defendant having stopped it, the plaintiff, who was one of the inhabitants, might bring an action on the case, as there was no other remedy.

^o 12 East, 428.

^p L. R. 4 Exch. 43; 38 L. J. Exch. 1.

^q Cro. Eliz. 664.

Pollution of water may produce injury in various ways to those persons who have a right that the water shall be suffered to remain pure. If the right is to use water for the purpose of drinking or of watering cattle, pollution may render the water unfit for those purposes; if the right is to take water for the purpose of supplying boilers of engines, pollution may produce corrosion of the metal and destruction to the machine; and if the water is not applied to any particular purpose of utility, yet great injury may be produced by pollution to the riparian proprietors by destruction of fish, or by putrefying the air in the neighborhood of the stream with noxious smells. In all these and similar cases the law affords a remedy by action for damages or for an injunction, unless the party causing the pollution is justified in so doing by virtue of an easement or acquired right to foul the water. It was said in *Aldred's case*^r that "if a man has a watercourse running in a ditch from the river to his house for his necessary use, if a glover sets up a lime-pit for calf-skins and sheep-skins so near the said watercourse that the corruption of the lime-pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it, as it is adjudged in 13 H. 7, 26 b, and this stands with the rule of law and reason, *sc. Prohibetur ne quis faciat in suo quod nocere possit alieno: Et sic utere tuo ut alienum non lædas. Vide* in the Book of Entries, Tit. Nusance, 406, b, he who has a several Piscary in a water shall have an action on the case against him who erects a dyehouse *ac fimos fæditates, et alia sordida extra domum præd' decurrentia in piscariam præd' decurrere fecit, per quod idem proficuum piscariæ suæ præd' totaliter amisit, &c.*" So, also, it was said by Sir J. Romilly, M. R., in the case of *Goldsmid v. The Tunbridge Wells Improvement Commissioners*,^s "My opinion is, that any person who has a watercourse flowing through his land, and sewage which is perceptible is brought into that course, has a right to come here to stop it." But it was also said by Lord Justice Turner, in the same case on appeal, "I

^r 9 Coke, 58.

^s L. R. 1 Eq. at p. 169; 35 L. J. Ch. at p. 93.

adhere to the opinion which was expressed by me and by the lord chancellor in the *Attorney General v. Sheffield Gas Consumers' Company*,[†] that it is not in every case of nuisance that this court should interfere. I think that it ought not to do so in cases in which the injury is merely temporary and trifling; but I think that it ought to do so in cases in which the injury is permanent and serious: and in determining whether the injury is serious or not, regard must be had to all the consequences which may flow from it."

It has been shown that the fact that the air is polluted by other persons by similar or different means does not justify a man in increasing that pollution; the case is the same with water, for the fact that other causes contribute to the pollution of a stream does not justify a riparian owner or any other person in adding to the impurity of the water. This was particularly noticed by Lord Chelmsford, C., in the case of *Crossley & Sons (Limited) v. Lightowler*,[‡] in which he remarked that where there are many existing nuisances, either to the air or water, it may be very difficult to trace to its source the injury occasioned by any one of them; but if the defendants in that suit were to add to the former foul state of the water, and yet were not to be responsible on account of its previous condition, this consequence would follow, that if the plaintiffs were to make terms with the other polluters of the stream, so as to have the water free from impurities produced by their works, the defendants might say, "We began to foul the stream at a time when as against you it was lawful for us to do so, inasmuch as it was unfit for your use, and you cannot now by getting rid of the existing pollutions from other sources prevent our continuing to do what at the time when we began you had no right to object to."

Previous
pollution
no justifi-
cation for
fouling
water.

Pollution of streams like pollution of air is frequently caused by the exercise of lawful trades, in the course of which

[†] L. R. 1 Ch. App. at p. 354; 35 L. J. Ch. at p. 384; *Attorney General v. Gee*, L. R. 10 Eq. 131.

[‡] L. R. 2 Ch. App. 478; 36 L. J. Ch. 584; *Wood v. Waud*, 3 Exch. 748; 18 L. J. Exch. 305.

it becomes necessary to dispose of refuse matter and other filth which is produced in manufacturing processes; and in the erection of manufactories, nothing is more common than to make the waste pipes and sewers which are intended to convey this filth from the factory lead into some stream that the matter may by that means be washed away; from the adoption of that practice the question has arisen, whether the facts that a trade is lawful, and that it is carried on for purposes necessary or useful to the community, and in a reasonable and proper manner, and in a proper place, will justify the pollution of a stream to the detriment of riparian owners. It has been explained that the above facts will not justify the pollution of air, so neither will they justify pollution of water."

It is very difficult, and perhaps impossible, to lay down any general rule as to the cases in which the court will interfere by injunction to restrain pollution of water. An expression of opinion on this point, by the master of the rolls and the Lord Justice Turner, in the case of *Goldsmid v. The Tunbridge Wells Improvement Commissioners*, has already been noticed, and the subject has been referred to in several parts of this work. Besides the expressions of opinion already referred to, the Vice Chancellor Wood is reported to have said: "I desire to add that whilst I do not wish to encourage application to the court upon trivial matters, on the other hand, I am far from holding out the notion that anything like large or heavy damages must be recovered before the plaintiff can be assisted."^v The fullest explanation, however, of the conditions that are essential to induce the Court of Chancery to interfere by injunction to restrain pollution of water, occurs in the judgment of Kin-

^v *Stockport Waterworks Co. v. Potter*, 7 H. & N. 160; 31 L. J. Exch. 9; *Merrifield v. Lombard*, 13 Allen, 16; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Holsman v. Boiling Spring Bleaching Co.* 14 N. J. Eq. 335; *Lewis v. Stein*, 16 Ala. 214.

^w *Lingwood v. Stowmarket Co.* L. R. 1 Eq. 77. See, also, *Clowes v. The Staffordshire Potteries Waterworks Co.* L. R. 8 Ch. App. pp. 142, 143; 42 L. J. Ch. pp. 112, 113.

dersley, V. C., in the case of *Wood v. Sutcliffe*, which has already been quoted at length, and will be found in the earlier part of this chapter.^x

Pollution of water frequently arises from the formation of sewers, for the purpose of draining towns, and the pouring of sewage by that means into streams; and sewers for that purpose are commonly made under the authority of acts of parliament. It is most desirable, and indeed necessary for the public health, that towns shall be properly drained, and it is obvious that the public good must in many cases be brought into antagonism with private rights; when that event happens questions arise as to the interest which is to prevail. This subject has been discussed in various reported cases. In *Lillywhite v. Trimmer*,^y which was a case of this kind, Malins, V. C., said, that on the one side he took it that the doctrines of the Court of Chancery were pretty well settled; that however desirable public improvements might be, if you cannot effect them without interfering with private rights, private rights must prevail, and that those who desire public improvements must effect them as best they can, without interfering with those private rights; he added that that was the principle acted upon by Vice Chancellor Wood in the *Birmingham case*,^z and it had been acted upon by the same learned and distinguished judge in many other cases, that he had been followed by the master of the rolls, and more recently by the lords justices; he therefore considered it a settled point. On the other hand, he continued, if there is an important object to be effected, such as the drainage of a town, than which nothing can be more important, he could not help thinking that such great and important public objects are not wholly to be overlooked. From this and the other decisions it appears now to be settled that

Restraint
of drainage
of towns if
streams are
polluted.

^x *Ante*, p. 364.

^y 36 L. J. Ch. 525 (not in the Reports); *Attorney General v. Gee*, L. R. 10 Eq. 131; *Attorney General v. Leeds Corporation*, L. R. 5 Ch. 583; 39 L. J. Ch. 711.

^z *Attorney General v. The Council of the Borough of Birmingham*, 4 K. & J. 528.

the High Court of Justice will restrain the pollution of a stream, by the drainage of a town, however desirable such drainage may be, if a riparian proprietor sustains *material* injury from pollution of a stream; but the court will have regard to the balance of inconvenience, and if the injury sustained is trifling and can be fairly compensated by a money payment, and if the drainage is of great importance, the court will refuse to interfere by injunction.

IN AMERICA,

this subject has been frequently considered, and it has been generally agreed that although a town or city may be authorized by statute to lay out and construct sewers through any public streets or private lands, and emptying into tide-waters, this does not justify the city in discharging mud and filth through such sewers into a private dock, in such quantities as to fill it up and obstruct it, or make it offensive; and if the city does so, it is liable to the private party in an action for damages, and may also be restrained by injunction from continuing such nuisance.¹ If, however, the statute authorizing the laying of public sewers also provides a special mode of ascertaining and awarding the damage thereby caused private parties, an action at law or bill in equity will not lie for any injury which is the necessary result of the exercise of the powers conferred by the statute, but only the special remedy provided by the law for *such* private injuries; but for any damages resulting from any improper use of the exercise, any excess of power, or negligence in building or taking care of the *sewer* when completed, a private action will lie, if the damage be special to the plaintiff, or an indictment if it be a public nuisance.²

The court will interfere by injunction at the suit of a riparian owner who is injured by pollution of a stream only in case he is injured in his character of riparian owner; for otherwise he has no more right to its aid than any other individual. Thus, in the case of

Riparian owners must prove injury in that character.

¹ See *Haskell v. New Bedford*, 108 Mass. 208.

² See *Washburn & Moen Man. Co. v. Worcester*, 116 Mass. 458; *Merri-field v. Worcester*, 110 Mass. 216; *Brayton v. Fall River*, 113 Mass. 218.

Crossley & Sons (Limited) v. Lightowler,^a it appeared that the plaintiffs, who applied to the court in their character of riparian owners for an injunction to restrain pollution of a stream, did not actually use the water of the stream as it flowed past their land, but artificially obtained a supply of water from the same stream at a point considerably higher up than their land, by means of a pipe running for some distance underground, and that the pollution complained of was not directly opposite their land and factory, but at the point where the underground pipe passed into and received water from the stream. The court refused an injunction so claimed on the ground that the injury was clearly not an injury to the rights of the plaintiffs as riparian proprietors.

Pollution of water is an injury of a very different kind from diversion or obstruction of streams, and although no legal injury is done, and no action will lie for obstruction or diversion of underground streams of water, which are unknown or undenned, *pollution* of such water to the detriment of another person is a legal wrong for which the court will afford a remedy.^b

Pollution
of under-
ground
water.

It is a difficult question to determine whether a riparian owner on the banks of an *artificial* stream can sue for pollution of the water, unless he has acquired a right or easement by grant or long enjoyment that the water shall not be polluted. If he has not applied the water to any purpose of utility, there can be no doubt that no right of his is injured by pollution, for he has no natural right to purity of water as in the case of a natural stream, and he therefore cannot sue; but if he, without any right or by mere license, has appropriated the water for a purpose of utility, as, for instance, for use in a factory, and a stranger without any right pollutes the water, the question is whether his possessory title to the water is sufficient to enable him to sue. It would seem that it is, though in all probability he would not be entitled to sue the owner of the

Right of
action for
pollution
in the ab-
sence of
right to use
water.

^a L. R. 2 Ch. App. 478; 36 L. J. Ch. 584.

^b *Hodgkinson v. Ennor*, 4 B. & S. 229; 32 L. J. Q. B. 231; *Womersley v. Church*, 17 L. T. 190 (not elsewhere reported). But see *Brown v. Illius*, 25 Conn. 583.

stream under similar circumstances, for if he had obtained no right to the use of the water, mere appropriation could not oust the owner of the stream of his possessory right to use it in any way he might think proper, and among other things to pollute it, and if he had obtained a mere license to use the water, that license would be revoked if the owner did anything by which it appeared the permission was terminated, as if he rendered the water unfit for use. That mere appropriation of the water of an artificial stream by a riparian owner will confer a right of action upon him against any stranger, who, without right, pollutes the water to his detriment, seems probable from several cases, though the authorities are by no means conclusive, and the point is nowhere actually decided. In the case of *Wood v. Waud* ^c an expression occurs which somewhat favors the doctrine that the appropriator may sue. Speaking of an artificial stream produced by the pumping of water from a mine which flowed thence over the land of several persons, it was said that the mine owners merely get rid of a nuisance, and that no right can be acquired against them that the stream shall not be stopped, but that each landowner over whose ground the water flows may take and use any of the water he pleases while it is upon his soil; that proprietors of the land below have no right to any part of the water until it has reached their own land, that they have no right to compel the owners above to permit the water to flow through their land for their benefit, and consequently that they have no right of action if they refuse to do so. "*If they polluted the water so as to be injurious to the tenant below, the case would be different.*"

It seems, therefore, from this opinion of the court, that though the landowner might have no right to receive the water, yet that having received it, it would be an actionable injury if any one without right polluted it, the cause of action apparently arising from the injury sustained after lawful appropriation of the water. The principal case, however, which bears upon the subject is *Whaley v. Laing*, ^d in which it

^c 3 Exch. at p. 779; 18 L. J. Exch. at p. 314.

^d 2 H. & N. 476; 26 L. J. Exch. 327: affirmed in the Exchequer Cham-

appeared that the plaintiffs obtained leave to take water from a canal by means of pipes for the purpose of supplying their engines, and that the defendant, without justification, poured chemical matter into the water, which had a detrimental effect on the machinery of the plaintiffs. The court were of opinion that the plaintiffs were entitled to recover, though not without considerable doubt arising from the form of the declaration. The plaintiffs, the court said, had, by permission of the owners of the canal, got possession of a certain quantity of water in their cistern or reservoir, which water they were entitled to pump up from the cistern or reservoir as much as they would have been entitled to use it if they had taken it up in a pail or bucket. Upon their emptying the cistern or reservoir, other water flowed in from the canal to supply its place. This water the defendant had fouled, and the consequence was that foul water flowed into the plaintiff's cistern, the plaintiffs only contributing thereto by removing the water already therein, which they had a clear right to do; and this being done without justification by the defendant, it gave the plaintiffs a cause of action. There was, it was added, an allegation in the declaration traversed by the defendant, namely, that the water *ought* to flow without being fouled in the canal. The court considered that to mean not an assertion of title in the plaintiffs, but that the defendant had no right to foul the water there. It should be noticed that the court then expressly said that they gave no opinion on many of the points discussed in the argument, particularly as to whether the plaintiffs had any possessory title to the water in the canal, so that if the defendant had stopped its flow to the plaintiffs, or if the plaintiffs had, in order to get the water, to go to the canal with a bucket, and had drawn it foul from the canal, any action could have been maintained; the opinion of the court proceeded on the ground that the defendant caused foul water to flow on the plaintiff's premises without right to do so, and that opinion, it was added, was warranted by the cases cited, which showed that^e

ber, the judges being divided in opinion, 3 H. & N. 675; 27 L. J. Exch. 422.

where there is a right to water there is a right, if it comes or is sent, to have it come or have it sent without pollution. In the Exchequer Chamber much difference of opinion prevailed among the judges. Willes and Crowder, JJ., thought that the action would lie on the ground that the plaintiffs were in possession, and the defendant was a wrong-doer. Crompton and Erle, JJ., thought the judgment should be for the defendant, on the ground that the declaration informally alleged a right to the use of the water, and that no right was proved, but they would not say that under some circumstances an action might not lie if one person had permission to use water and a stranger wrongfully polluted it, for that such an action would be founded, not on the title or right to the water, but on the injury to the property of the plaintiffs. Williams, J., thought the verdict should have been found for the plaintiffs, but that judgment should be arrested, as the declaration was bad in substance, for in his opinion it showed no cause of action; he agreed with the barons of the exchequer as to the meaning of the declaration, but then as it did not allege that the plaintiffs were rightfully in possession, and there was nothing to show that they themselves were not wrong-doers in using the water for their engines, he thought that judgment should be arrested. Whiteman, J., also thought the declaration disclosed no cause of action, for reasons similar to those given by Williams, J. From these authorities it is very difficult to determine what the law is on this point. In the case of *Whaley v. Laing*, so much doubt and difference of opinion existed in the court, that the case is of little value as an authority. Possibly, if a similar case arose, it would be held that a difference exists when the water is used by permission, from instances when it is taken without any right and without license; for if permission to use the water is given, there is a sort of possessory title, though there is no legal right to the undisturbed use of the water, but if the person using it has not even a license, it is questionable whether he can be said even to have a possessory title.*

* The learned editors of Smith's Leading Cases seem to think that a mere licensee who uses the water of an artificial stream cannot sue even

The doctrine of contributory negligence or mutual fault does not apply to actions for the disturbance of an easement in a watercourse; and although the plaintiff may have partially obstructed the natural flow of water to his own mill, he may nevertheless recover for an additional and independent wrongful obstruction by the defendant, the damage, of course, being carefully limited to the defendant's acts alone.¹ Neither do the principles of set-off, recoupment, or benefits conferred by the defendant affect his liability for any wrongful interference with the plaintiff's right. But if the defendant be charged with a diversion of an unreasonable amount of water from the stream above the plaintiff's premises, he may show that he had, by cutting ditches across his land, and connecting with the stream, increased the natural flow of water in the same, that the amount he had afterwards diverted was not unreasonable, and so no infringement of the plaintiff's legal right had occurred.²

Plaintiff's
own
wrong.

WAYS.

Actions will lie against a servient owner for obstruction of a right of way only when he causes the obstruction by his own act;³ he cannot be sued if the way becomes impassable otherwise than by his act; he, therefore, cannot be sued if the way is out of repair, for it is the business of him to whom a right of way belongs

No right of
action for
neglect to
repair a
way.

a wrong-doer for pollution; for they say: "Thus, as a mere license confers no right at common law against the licensor, but only excuses that which if not done under the license would have been a wrong to him, the licensee of that which might have been conferred as an easement or *profit à prendre* cannot, it is apprehended, maintain an action against a wrong-doer for depriving him of the benefits which he might or would have enjoyed under the license." The case of *Whaley v. Laing* is then referred to. Note to *Armory v. Delamirie*, 1 Sm. Lead. Cas. 6th ed. p. 318.

¹ *Clarke v. French*, 122 Mass. 419.

² *Elliot v. Fitchburg Railroad Co.* 10 Cush. 191. The reporter's note does not indicate this point, but it was directly decided in the case at p. 197.

³ But the owner of land, through which another has a right of way, is liable for the obstruction of others, customers of his, who occupy the way with his knowledge and assent, and thereby prevent a free and convenient use of the way. *Dennis v. Sipperly*, 17 Hun, 69.

to repair the way.¹ Thus it has been decided that if a man grants a watercourse and afterwards stops it, or demises a house and estovers, and afterwards destroys the wood, the party grieved has a right of action, for those are wilful acts of the grantor of the right, and it is a misfeasance in him to annul or avoid his own grant, and so if a grantor of a right of way voluntarily stops it, an action will lie for the misfeasance, but for the bare nonfeasance in not repairing the way when it is out of repair, no action will lie.²

The act of stopping a way is commonly an act which produces injury or inconvenience to the occupier of the dominant tenement alone, and not to a reversioner, so that the latter cannot sue for it;³ but if the obstruction is of a permanent character, or calculated to call his right in question, the latter, as well as the occupier, may sue. In *Bell v. The Midland Railway Company*⁴ it was held that the placing of railway trucks on a siding with a view of preventing access from a wharf over the siding to the railway, and permanently keeping them there, so as wholly to obstruct the way, was an injury for which the reversioner, under the circumstances of the case, might sue; and, in *Kidgill v. Moor*,⁵ it was held that even the locking of a gate across a way might be an injury to a reversionary estate.

Obstructions of ways may be either permanent or temporary in their character, that is, the article or mode of obstruction may be placed in the way with the intention, evident from its character, of its not being removed again, or it may be a movable object which it may be inferred the party obstructing the way will sooner or later take away. Thus, the obstruction may be by a fence

¹ *Jones v. Percival*, 5 Pick. 486; *Walker v. Pierce*, 38 Vt. 94.

² *Pomfret v. Ricroft*, 1 Wms. Saund. 320 d; *Taylor v. Whitehead*, Doug. 716.

³ *Mott v. Shoolbred*, L. R. 20 Eq. 22; 44 L. J. Ch. 380.

⁴ 10 C. B. N. S. 287; 30 L. J. C. P. 273.

⁵ 9 C. B. 364; 9 L. J. C. P. 177. And see *Richardson v. Bigelow*, 15 Gray, 154.

fixed to the earth or by the ploughing up of a path or breaking down of a bridge, or it may on the other hand be by the placing of a cart or bales of goods in the middle of a road. When obstructions are permanent in their character little difficulty can arise as to the right of action, but questions have several times arisen whether obstructions of a merely temporary character are such as to support an action, for merely temporary obstructions may be and have sometimes been so continually repeated as to interfere with the user of a right of way as much as if they were permanent. In the case of *Bell v. The Midland Railway Company* just cited it was held that the placing of railway trucks across a private siding leading to the defendant's railway was an obstruction of the way sufficiently permanent in its character to support an action by a reversioner because the trucks were kept there continually for the purpose of stopping the user of the way. So, again, in the case of *Thorpe v. Brumfitt*¹ it was held that the continual obstruction of a way to an inn-yard by loading and unloading wagons was an unjustifiable obstruction which the Court of Chancery restrained by injunction, and this remedy was granted although the obstructions were not created by one defendant alone but by several who had warehouses abutting on the way, and although the obstruction created by each separately might not have been sufficient of itself to support the suit.

An action lies for erecting a building over a passage-way which renders the way low, dark, or otherwise less convenient or useful, to any practical extent than the owner had a right to have.¹

A private right of way is not necessarily merged and extinguished in a public right of way if the latter right is acquired over the same soil where the private right exists. It is therefore no answer to an action for obstructing a private right of way to say that a public right of way has been acquired over the same road.² It

Obstruction of private way over a public road.

¹ L. R. 8 Ch. App. 650; *Mott v. Shoolbred*, L. R. 20 Eq. 22.

² *Richardson v. Pond*, 15 Gray, 387.

³ *Allen v. Ormond*, 8 East, 4.

is necessary that this point should be borne in mind, for the only remedy for obstruction of a public way is by indictment, an action not being maintainable unless the plaintiff has sustained some special and peculiar damage over and above the rest of the public: but it would produce great injustice if the owner of a private right of way were to lose his right on the public also acquiring a right of way, for then he would also lose his right of action which he might wish to avail himself of to get rid of the obstruction. It has been shown, however, that a private way cannot be acquired by prescription over a public road, and therefore if it can be proved that the public right existed before the alleged private right of way, an action for obstruction of the latter will be defeated.

If a private way leads into a public road an action will lie for obstruction of the private way, although the obstacle is actually placed in the public road. A declaration, therefore, which alleged that the plaintiff, who owned a public-house on the banks of the Thames, had a right of access to his house from the river, and that the defendant wrongfully put timber in the river so as to obstruct the access to the house, was held to disclose a good cause of action as showing an obstruction to the private right;¹ and where a wharf abutted upon a recess of the river Thames, up which the water flowed, and by means of which access was obtained for barges to come from the river to the wharf, it was held that the owner of the wharf had a private right, over and above the rest of the public, of access to his wharf, acquired by fifty years user, and an injunction was granted to restrain the Fishmongers' Company and the conservators of the river from making an embankment in the river, under certain statutory powers, in such a manner as to block up the recess of the river and impede the plaintiff's access to his wharf.^m

¹ *Rose v. Groves*, 5 M. & G. 613; 12 L. J. C. P. 251.

^m *Lyon v. The Fishmongers' Co. and the Conservators of the River Thames*, L. R. 10 Ch. App. 679; 46 L. J. Ch. 68.

CHAPTER V.

ON EXTINCTION, SUSPENSION, AND REVIVAL OF EASEMENTS.

HAVING in the previous chapters traced the history of the law of easements by describing their nature and peculiar incidents, the modes in which they may be acquired, their extent and the way in which they may be used, and the injuries to which the owners of those rights may be subjected with regard to them, together with the remedies afforded by law for such injuries, it remains in this, the last chapter of this work, to discuss the modes in which easements and natural rights may be extinguished or temporarily suspended, and when they are suspended, in what cases and by what means they may be revived. Licenses, moreover, which have in the previous chapters claimed but little attention, demand a passing notice in this part of the work.

SECT. 1. — *On Extinction, Suspension, and Revival of Easements generally.*

In considering the subject of extinction and suspension of easements, it will be found of the greatest importance to bear in mind the distinction which exists between easements, properly so called, and natural rights, particularly as to their origin and mode of acquisition. It has been explained that easements always have their origin in a grant, either express or implied, and are created at the will of the owner of the servient tenement, but that natural rights are incident to the possession of the soil of the dominant tenement, that they are in every case given by law, and are attached to that soil permanently, without respect to the will of the servient owners. From this peculiarity and distinction it follows that while easements

Extinction and suspension of easements and natural rights.

may be either suspended temporarily or extinguished permanently, natural rights can be suspended only, and not extinguished, so that as soon as any opposing power by which natural rights are suppressed, is removed, they at once, and without any grant, revive by force of the law which annexed them to the soil. Thus natural rights may be suspended on the creation by grant of adverse easements, but if those easements are extinguished the natural rights at once revive. To take an instance of this, a riparian owner has a natural right to the uninterrupted flow of the water of a natural stream, but a mill-owner may acquire an adverse right, entitling him to divert the water before it reaches the riparian owner's land, and the natural right is in that case suspended; but if the mill is afterwards permanently removed the easement is extinguished, and the natural right revives. So, also, if a right has been acquired to pollute air or water by carrying on a particular business in a factory, the natural right of the neighbors to purity of air or of the water is suspended, but it immediately revives on removal of the factory and abandonment of the trade. This principle of law has been fully recognized in several cases which have been determined in the courts, one of the earliest of which is *Sury v. Pigot*,^a which was an action for stopping a natural watercourse, and the question was whether the right to the flow of the water had been extinguished by unity of ownership. The case was fully argued and the right was compared to a right of way and other rights which would be extinguished by that means, but it was held that the natural right to the flow of water was not extinguished, Whitlock, C. J., saying: "A way or common shall be extinguished, because they are part of the profits of the land, and the same law is of fishings also, but in our case the watercourse doth not begin by the consent of parties nor by prescription, but *ex jure naturæ*, and therefore shall not be extinguished by unity," and the report continues: "Two closes adjoin together, the one being by prescription bound to a fence, the owner of the one purchase, the other dies, having issue two daughters, who make partition,

^a Popham's Rep. 166.

it is a quære whether the inclosure be revived; yet I conceive clearly that by unity of the possession the inclosure is destroyed, for fencing is not natural, but comes by industry of men, and therefore by unity it shall be gone; and so briefly with this diversity he concluded, that where the thing hath its being by prescription unity will extinguish it: but where the thing hath its being *ex jure naturæ*, it shall not be extinguished." This view was approved by the Court of Exchequer in the case of *Wood v. Waud*,^b where it is said in the judgment: "Mr. Justice Whitlock also in *Sury v. Pigot*, and *Crew, C. J.*, and *Lee, C. J.*, in *Brown v. Best*, treat the right as arising *ex jure naturæ*; and consequently it is not extinguished as an easement *in alieno solo* would be by unity. And this seems to us the correct opinion, though it is not necessary to decide the point on the present occasion." It has in many of the earlier cases been said that an easement of necessity is not extinguished by unity of ownership, but in later cases the principle of the law has been placed upon its right footing in this respect, for it has more recently been explained that easements of necessity, like other easements, are extinguished by unity of ownership, but that upon severance of the original dominant and servient tenements a fresh easement of necessity is newly created if the necessity continues.^c

Extinction of easements may be effected in various ways, as by act of parliament, by operation of law, and by the act of the owner, as by release, actual or presumed, or by abandonment, but they can never be extinguished or abridged by the mere act of the servient owner alone.^d

Extinction
of ease-
ments.

^b 3 Exch. at p. 775; 18 L. J. Exch. at p. 312; *Mason v. The Shrewsbury and Hereford Railway Co.* per Cockburn, C. J., L. R. 6 Q. B. at p. 588; 40 L. J. Q. B. at p. 298.

^c *Pheysey v. Vicary*, 16 M. & W. per Parke, B., at p. 491; *Holmes v. Goring*, 2 Bing. 76; 2 L. J. C. P. 134.

^d *Selby v. Nettlefold*, L. R. 9 Ch. App. 111; 43 L. J. Ch. 359; *Hawkins v. Carbines*, 27 L. J. Exch. 44 (not elsewhere reported); *Horne v. Taylor*, Noy's Rep. 128. But in *Ballard v. Butler*, 30 Me. 94, A. had an easement by grant to take water from the well of B. The latter covered over the well with brick buildings of a permanent character, and the same so con-

1. By act of parliament easements may be extinguished either by the express terms of the act or by implication; so they may be extinguished upon the performance of something in execution of the purpose of an act, as, for instance, it was held that when commissioners, acting under the General Inclosure Act, 41 Geo. III. c. 109, made an allotment of waste land over which there had been a private right of way, and refrained from noticing the way or setting out another in its stead in their award, the right of way was extinguished.^c

So where by a public act a corporation was authorized to build a pier according to certain specified plans, but, if so constructed, a certain public right of way would thereby become unavailable, it was held that the act must be considered to have extinguished the right of way by implication, although no reference thereto was made in the act.¹

A right of way to certain buildings is completely extinguished by laying out and constructing a public highway over the *very site of such buildings*, and cannot be revived.² The action of the legal authorities has made the future enjoyment of the easement *absolutely impossible*.

So where an easement in favor of lot A existed by *prescription* in a chimney on the adjoining lot B, and the city, for the purpose of widening a street, purchased lot A, took down the buildings thereon, appropriated most of the land for the

tinued for several years. Afterwards A. sold his estate (the dominant estate) to C., and B. sold the servient estate to D.; and it was held that the easement was so far extinguished by the act of B. that C. could not maintain an action against D. for continuing the obstruction, or destruction. And in *Arnold v. Cornman*, 50 Penn. St. 361, the owner of the servient estate, subject to a right of way, openly erected a permanent wall across the way, which the other saw going on day by day without objection, and even directed in some particulars, and this was held to amount to an estoppel. And see the valuable case of *Taylor v. Hampton*, 4 McCord, 96; *Pope v. O'Hara*, 48 N. Y. 447; *Corning v. Gould*, 16 Wend. 531.

^c *White v. Reeves*, 2 Moo. 23.

¹ *Corporation of Yarmouth v. Simmons*, 10 Ch. D. 518 (1878).

² *Hancock v. Wentworth*, 5 Met. 446. And see *Mussey v. Union Wharf*, 41 Me. 34; *Central Wharf v. India Wharf*, 123 Mass. 567.

street, and after allowing the rest to remain vacant for about six years, conveyed it to the plaintiff by a deed of quitclaim, without any allusion to an easement in the chimney, it was held that the easement was lost by abandonment and the operation of law, and that the plaintiff did not acquire any right thereto by his deed from the city.¹

2. An easement may be extinguished by operation of law, as, for instance, if the privilege has been granted for a particular purpose, and the purpose is accomplished. An instance of extinction of an easement by this means is to be found in the case of *The National Guaranteed Manure Company v. Donald*,² the facts of which case were that a company had been incorporated by act of parliament for the purpose of forming a canal, and the canal when made was, according to the terms of the act, supplied with water taken by means of a cut from a certain dam or mill-race, and some water-wheels and sluices were erected in order to render the supply of water effectual for the purpose of the canal; subsequently a grant of the watercourse was made to the company by the Corporation of Carlisle who were owners of the land through which the cut was made. Some time afterwards an act of parliament was passed by which the company was re-constituted as a railway company for the purpose of constructing a railway, and thereupon they demised to the plaintiffs in the action the property they held at Carlisle, including their wheel-house, together with the water-right in dispute in the action, and it was determined by the court that the railway company had no right to make the demise, for that the company had arisen out of the canal company which had a right to the watercourse for the purpose of their canal, but that as that company had ceased to exist, and the railway company had no canal for which to take the water, the right to take it also ceased; and Pollock, C. B., added, that where an easement is granted for a particular purpose, or arises out of the enjoyment of a right for a particular purpose which no longer exists, so that the

Extinction
by operation
of
law.

Completion
of the purpose
of a
grant.

¹ *Canny v. Andrews*, 123 Mass. 155.

² 4 H. & N. 8; 28 L. J. Exch. 185.

easement cannot be applied to the object for which it was originally granted, there is an end of the easement, whatever its nature might be.

It is on this principle that easements of necessity are extinguished when the necessity ceases. It has been *thought* that the termination of the necessity would not effect the extinction of the easement,^a but that opinion has not been supported. The question was raised and determined in the case of *Holmes v. Goring*,^b in which it was held that though a way of necessity may be acquired at the time of the purchase of particular land, yet if the purchaser subsequently becomes possessed of other ground over which he can pass, the necessity and, therefore, the reason for the existence of the right of way is at an end, and the right itself also ceases; in support of this decision a passage from a note of Mr. Serjt. Williams to the case of *Pomfret v. Ricroft*, was cited by Best, C. J., where it is said that "a way of necessity, when the nature of it is considered, will be found to be nothing else than a way by grant," but, added the judge, a grant of no more than the circumstances which raise the implication of necessity require should pass. And this doctrine is universally recognized in America.¹ And, therefore, if one has a way by necessity to his land over another's land, and a public highway is afterwards laid out adjoining his land, although on the opposite and more distant side thereof, his right of way by necessity is gone, although it would be more convenient for him to continue to use it rather than to use the highway.²

Alteration in the condition or character of a dominant tenement will frequently effect the extinction of an easement by operation of law, and questions of much difficulty have in many cases arisen as to the result of alterations of dominant tenements. It is obvious

^a *Buckby v. Coles*, 5 Taunt. 311.

^b 2 Bing. 76; 2 L. J. C. P. 134.

¹ See *Baker v. Crosby*, 9 Gray, 421; *Viall v. Carpenter*, 14 Gray, 126; *Abbott v. Stewartstown*, 47 N. H. 230; *Pierce v. Selleck*, 18 Conn. 321; *Alley v. Carlton*, 29 Tex. 78; *Screven v. Gregorie*, 8 Rich. L. 158; *Holmes v. Seeley*, 19 Wend. 507; *N. Y. Ins. and Trust Co. v. Milnor*, 1 Barb. Ch. 353.

² See *Abbott v. Stewartstown*, 47 N. H. 230.

that in many cases alterations may be of a trifling nature, and of a character which will not inflict sensible injury on the servient tenement by increasing the burden of the easement or otherwise, while, on the other hand, the burden may often be seriously enlarged, and the user of the right totally changed from that originally contemplated by the grantor of the privilege. The law marks this difference, and it will be found that the change in the character of the user and in the extent of the burden may generally be adopted as a criterion whether an easement has been extinguished.

It may be remarked that rights to light acquired under the Prescription Act are not affected by this principle, as will be shown hereafter, but, as already shown, these rights stand upon a footing peculiar to themselves.

As a general rule it may be taken that any alteration of a dominant tenement, of such a nature that the tenement or the mode of user of an easement is substantially changed in character, or that the burden on the servient tenement is materially increased, will cause the extinction or suspension of an easement, unless the easement was intended for the benefit of the dominant tenement, to whatever purpose it should be applied, or in whatever manner the easement should be used.⁴ In *Allan v. Gomme*⁵ the question was as to the construction of a deed, and the extent of a right of way thereby granted. The easement granted was "a right of way and passage over the said close to the stable and loft over the same, and the space or opening under the said loft now used as a woodhouse." This loft and woodhouse had been removed, and a cottage had been built on their site, and on the space which had been under the loft, and the question was, whether the right of way was lost, or whether the grant extended the right to the spot of ground for whatever purpose it was used. It was held that the words "now used as a woodhouse," were employed merely to ascertain the locality of the dominant tenement, and did not mean

Alteration
must be
material.

⁴ *United Land Co. v. Great Eastern Railway*, L. R. 10 Ch. App. 586; 44 L. J. Ch. 685.

⁵ 11 A. & E. 759; 9 L. J. N. S. Q. B. 258.

that the way could only be used while the place was used as a woodhouse; but it was also held that the way could only be used to the spot while the place remained in the same predicament as it was in at the time of making the deed, and that the dominant owner might have the benefit of the way to make a deposit of any articles, or use the spot in any way he pleased, provided it continued in the state of open ground. But the court also thought the dominant owner could only use the way for purposes which were compatible with the ground being open, and that if any buildings were erected upon it, it was no longer to be considered as open for the purposes of the grant. It was also remarked that the use of the dominant tenement would be very different when used as a woodhouse, and when a cottage was erected; that when a cottage was built a much greater number of persons, some possibly with horses and carts, would come, and so considerably increase the user of the way, and perhaps by that means obstruct or inconvenience the servient owner and prevent him having the same enjoyment of the ground that he had before. This decision was not altogether approved by Parke, B., for, in the later case of *Henning v. Burnet*, he expressed an opinion that it was too strict, as it was said the way could only be used to the place while it continued in the same predicament as it was in at the time the grant was made. No doubt, he said, if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tan-yard, the right of way ceases, but if there is a general grant of all ways to a cottage the right is not lost by reason of the cottage being altered. He thought, however, that the decision in *Allan v. Gomme* might be supported by the context, because it was a reservation of a right of way to a particular space only, which was then used as a woodhouse, and was not like the case of a general grant of a way to Greenacre which would mean for whatever purpose the field was used, unless limited by the context.^k *Allan v. Gomme* was also criticised in the

^k *Henning v. Burnet*, 8 Exch. 187; 22 L. J. Exch. 79; *South Metropolitan Cemetery Co. v. Eden*, 16 C. B. 42; *Bower v. Hill*, 2 Bing. N. C. 339; 5 L. J. N. S. C. P. 77.

very late case of *Finch v. Great Western Railway Company*,¹ where Stephen, J., said: "It seems to us, upon the whole, that it establishes no general principle, but turns upon the construction of the particular deed referred to, a deed bearing no resemblance to the grant in the present case." So also, Willes, J., in speaking of a right of way to a field which had been acquired by prescription, said: "I quite agree also with the argument that the right of way can only be used for the field in its ordinary use as a field. The right could not be used for a manufactory built upon the field. The use must be the reasonable use for the purposes of the land in the condition in which it was while the user took place."² The case of *Rex v. Tippet*^m may be noticed here, as it bears upon the point under consideration, although it relates to a public and not to a private right of way. An act of parliament had been passed to enable persons to alter the course of a tidal river, which was, before the alteration, navigable only when the tide was high. By the side of the river there was a public towing-path which was used, in fact, only at high tide; but after the alteration of the river, when it became navigable at all times, the towing-path began to be used at all times, and the question was, whether the right of way was not altogether lost, as the burden on the servient tenement had been so greatly increased; it was held that the right was not lost, and that the path might be used at all times, for the user previously to the alteration was not limited by the ordinance of man but by natural causes, and the right to use the path existed perpetually, though the way was, in fact, only used at certain times because naturally impracticable at others.

If an alteration in a dominant tenement, or in the mode of using an easement, is not of such a nature that the tenement is substantially changed, or that the bur- Trifling alteration.

¹ 28 Weekly Rep. 230 (1879), stated more fully *ante*. And see *United Land Co. v. Great Eastern Railway*, L. R. 17 Eq. 167; *Newcomen v. Coulson*, L. R. 5 Ch. D. 133.

² *Williams v. James*, L. R. 2 C. P. at p. 582; 36 L. J. C. P. at p. 259; *The Wimbledon and Putney Commons Conservators v. Dixon*, 1 Ch. D. 362; 45 L. J. Ch. 353.

^m 3 B. & Ald. 193.

den on the servient tenement is materially increased, an easement is not destroyed in consequence of that alteration. Thus, where the owner of a house had a right that the water should drip from the eaves of his house into his neighbor's yard, the right was held not to be lost because he raised the height of his house so that the drops had a greater distance to fall, for the effect of that alteration was not prejudicial to the servient tenement.ⁿ And where an owner of some cattle-sheds had a right to have water flow through a pipe to the sheds, it was held he had not lost the right by pulling down the sheds and building cottages; this, however, was on the ground that the right was to have the water flow to the premises regardless of the purpose to which it was applied when it got there, but the decision would in all probability have been different if the burden on the servient tenement had been shown to be seriously increased by the alteration.^o So, also, a prescriptive right to the uninterrupted flow of a stream to a fulling mill was held not to be lost by the mill being changed to a grist-mill.^p Likewise the owner of paper mills, who had a prescriptive right to pollute a stream by pouring refuse matter into the water, was held not to be restricted in the use of his right to the making of paper from the materials he had been accustomed to use, provided he did not, by changing the materials, increase the injury ordinarily inflicted on other riparian proprietors.^q And again, a right to the uninterrupted flow of a stream was held not to be lost from the circumstance that the course of the stream had been altered to a trifling extent.^r

In the case of *Harvey v. Walters*^s the law was summed up by Grove, J., in the following terms: "It appears to us that to hold that any, even the slightest, variation in the enjoy-

ⁿ *Thomas v. Thomas*, 2 C., M. & R. 34; *Harvey v. Walters*, L. R. 8 C. P. 162; 42 L. J. C. P. 105.

^o *Watts v. Kelson*, L. R. 6 Ch. App. 166; 40 L. J. Ch. 126.

^p *Luttrell's case*, 4 Coke's Rep. 86; *Saunders v. Newman*, 1 B. & Ald. 258.

^q *Baxendale v. M'Murray*, L. R. 2 Ch. App. 790.

^r *Hall v. Swift*, 4 Bing. N. C. 381; 7 L. J. N. S. C. P. 209.

^s L. R. 8 C. P. at p. 166; 42 L. J. C. P. at p. 107.

ment of an easement would destroy the easement would virtually do away with all easements, as by the effect of natural causes some change must take place. Thus water percolating or flowing would produce some wear and tear and alter the height or width of the conduit; so would weather, alterations of heat and cold, &c. In the case of ancient lights, changes in the transparency of glass, wear and tear of frames, growth of shrubs, &c., would produce effects which would vary the character of the enjoyment. In the user of a footpath the footsteps would never be on the same line or confined accurately to the same width of road. We are of opinion that the question here as in *Hall v. Swift*[†] and other cases is whether there has been a substantial variance in the mode of or extent of user or enjoyment of the easement so as to throw a greater burden on the servient tenement. In the language of Sir Richard Kindersley, which was adopted by the master of the rolls in the late case of *Heath v. Bucknall*,[‡] there must be an additional or different servitude, and the change must be material either in the nature or in the quantum of the servitude imposed.”

Easements are also extinguished by operation of law if the seisin of the dominant and servient tenements becomes united in one and the same person.¹ This has been an established principle of the English law from very early times, and was distinctly recognized in the case of *Sury v. Pigot*,[§] already noticed, in which the difference

Extinction
on union of
seisin.

[†] 4 Bing. N. C. 381.

[‡] L. R. 8 Eq. 1; 38 L. J. Ch. 372.

¹ See *Hazard v. Robinson*, 3 Mason, 277, a leading case in America, where *Sury v. Pigot* was examined and fully confirmed. *Warren v. Blake*, 54 Me. 276; *Manning v. Smith*, 6 Conn. 289; *Kieffer v. Imhoff*, 26 Penn. St. 438, an instructive case; *Miller v. Lapham*, 44 Vt. 416; *Fetters v. Humphreys*, 19 N. J. Eq. 472; *Denton v. Leddell*, 23 N. J. Eq. 64; *Plimpton v. Converse*, 42 Vt. 712. If the fee and the easement are held under different titles, the latter legal and valid, and the former defective, the easement is, of course, not extinguished. *Tyler v. Hammond*, 11 Pick. 194.

[§] Popham's Rep. 166; *Buckby v. Coles*, 5 Taunt. at pp. 315, 316; *Heigate v. Williams*, Noy's Rep. 119.

between easements and natural rights in this respect was pointed out. The true reason why union of seisin has the effect of extinguishing easements is very apparent on consideration of the nature of those rights and their origin. Easements are, by their nature, rights, possessed by the owner of one piece of land in another piece of land belonging to a different person; if, therefore, the seisin of the two pieces is united in one owner the right must necessarily cease to be an *easement*, for it becomes one of the rights of property to which all owners of land are entitled. The right is not merely suspended on union of seisin so as to revive again on severance of the properties, for easements have their origin in grant, and on severance of the original dominant and servient tenements the original easements cannot revive without a fresh grant, and then, indeed, the rights granted are not the original but new easements. The reason for extinction of *rights of way* by unity of seisin is said by Whitlock, C. J., in *Sury v. Pigot*, to be because they are part of the profits of the land, and he couples them with rights of common and fishery, but there is probably some mistake in this: the true reason appears in the case of *Bright v. Walker*,^w where the court said that an easement could not be acquired by prescription if unity of possession existed during any part of the prescriptive period, "for then the claimant would not have enjoyed, as of right, the easement, but the soil itself;" that is, the enjoyment of the right of walking on the land would not be the exercise of an easement but the enjoyment of one of the ordinary rights which belong to every owner of land as incident to his property in the soil.

The expression "unity of ownership" has been commonly employed to denote that species of union which will prevent an easement being acquired by prescription, or will extinguish an easement after it has been gained, but the expression is not accurate, for "ownership" may mean ownership in fee, or for life, or for a term of years, or any other period, and the effect of the unity is not the same in all those cases. The expression "unity of posses-

Necessity
for union
of seisin.

^w 1 C., M. & R. at p. 219.

sion" is also used sometimes to denote the same thing, and this phrase is equally inaccurate. To extinguish an easement by this means it is necessary that there should be unity of *seisin*, for unity of ownership of the dominant and servient tenements for different estates merely causes suspension and not extinction of an easement. Thus, where the one tenement was held in fee, and the other for a term of five hundred years, it was held that this union did not extinguish but merely suspended the easement during the unity of possession, and that the right revived on severance of the tenements.² And the ownership of the two estates must be co-extensive. If one is owned in severalty, and the other in common, the easement in one is not extinguished.¹

Union of *seisin* even will not in every case cause extinction of easements. It was said by the Court of Exchequer Chamber, in the case of *James v. Plant*,³ "We all agree that where there is a unity of *seisin* of the land and of the way over the land in one and the same person, the right of way is either extinguished or suspended according to the duration of the respective estates in the land and the way;" and from that case it appears that unity of *seisin* will not extinguish, but will merely suspend an easement, if the estates in the respective tenements are not estates in fee simple. The facts in that case were that the dominant tenement was vested in two sisters as coparceners in fee, claiming by descent from their father, and that the servient estate came to them from their mother under her marriage settlement as tenants in common in tail general, and the court said that there could be no doubt but that any right of way which before the unity of *seisin* belonged to the dominant tenement over the servient tenement, became suspended in law from the moment when such unity of *seisin* commenced; and that such suspension of the right would continue until the unity of *seisin*

Seisin must be for estates in fee simple.

² *Thomas v. Thomas*, 2 C., M. & R. 34; *Simper v. Foley*, 2 John. & H. 555.

¹ *Atlanta Mills v. Mason*, 120 Mass. 244. See *Bradley Fish Co. v. Dudley*, 37 Conn. 136.

³ 4 A. & E. at p. 761.

should cease by the determination of the estate tail; but the court did not say that such a unity of seisin would cause the permanent extinction of the easement. In the same way, it is presumed, an easement would not be destroyed if one tenement were held in fee and the other merely for life. And this is well settled in the American courts.

Therefore, where the owner of the servient tenement in fee, over which a right of way existed, purchased the dominant tenement as trustee for the use of the wife of the owner of the dominant tenement, for her life, with remainder to her children, it was held that such purchase was no extinguishment of the right of way, nor even a suspension of it, during the life of the wife.¹

Unity of seisin for estates in fee will in every case cause easements to be extinguished, and it matters not that there has been no unity of *possession and enjoyment*, as, for instance, that one tenement has been in possession of a tenant during the whole period of unity, for notwithstanding that, extinction will be effected.²

3. The next mode by which easements may be extinguished is by the act of the owner, as by release, that is, by a re-grant of the right by the dominant to the servient owner. A release may be either actual or implied, but if actual, it can be effected only by deed. It is not a common thing to hear of an implied release of an easement, but abandonment of an easement is frequently met with, whereas these expressions appear to be synonymous, for, in truth, abandonment of an easement extinguishes the right only when a release can be implied from the abandonment and the surrounding circumstances. Thus, Mr. Justice Willes said: "I do not think that this court

¹ Pearce v. McClenaghan, 5 Rich. L. 178. Therefore an agreement by a tenant for years to abandon an easement cannot bind the reversioner, unless he be a party to it, or it be made with his acquiescence. Glenn v. Davis, 35 Md. 208. And so of a non-use by a mere tenant for life. Browne v. Trustees of the M. E. Church, 37 Md. 109.

² Buckby v. Coles, 5 Taunt. at pp. 315, 316.

means to lay it down that there *can* be an abandonment of a prescriptive easement like this without a deed or evidence from which the jury can presume a release of it"; and again, in the case of *Regina v. Chorley*,^b the court said: "The learned judge appears to have proceeded on the ground that as twenty years' user, in the absence of an express grant, would have been necessary for the acquisition of the right, so twenty years' cesser of the use, in the absence of any express release, was necessary for its loss. But we apprehend that as an express release of the easement would destroy it any moment, so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without any reference to time." From this it is apparent that the only way in which an easement can be extinguished by the act of the parties interested is by release, actual or presumed; that abandonment will not have that effect unless a release can be implied from that and the surrounding circumstances; and that when an easement is spoken of as having been lost by abandonment, it is intended that the circumstance are such that a release can be presumed.^c But rights by dedication may be lost by *adverse user*, or *abandonment*,¹ as well as rights obtained by prescription.

Non-user is generally the principal evidence of abandonment of an easement, but non-user is not by itself conclusive evidence that the right is abandoned, for it may be explained by, and must be considered with, the surrounding circumstances; it must, moreover, always be a question as to the intention with which the user was abandoned.² Thus non-user may be explained by showing that the owner of an easement had no occasion to use it,

Non-user alone insufficient evidence of release.

^a *Lowell v. Smith*, 3 C. B. N. S. at p. 127. See, also, *Bower v. Hill*, 2 Bing. N. C. 339; 5 L. J. N. S. C. P. 77.

^b 12 Q. B. at p. 518.

^c As to rights to light and other easements of a negative character, see *post*, p. 474.

¹ *Baldwin v. City of Buffalo*, 29 Barb. 396; *Callaway Co. v. Nolley*, 31 Mo. 393; *Alves v. Henderson*, 16 B. Mon. 131; *Knight v. Heaton*, 22 Vt. 480; *Commissioners v. Taylor*, 2 Bay, 292.

² *Jamaica Pond Aqueduct v. Chandler*, 121 Mass. 3.

he having other and more convenient means of enjoying his land than by using his easement.^d On this ground it has been held that a right of way along a stream is not lost if the owner of the right allows a part of the stream to become filled with mud, even though it remains impassable for sixteen years, for the mud may be removed if the way is required.^e So if an easement to appropriate the water of a natural stream in a particular way, as to turn it by a dam to carry a mill, has been gained by prescription, a short cessation of the use caused by the burning of the mill will not destroy the right if the mill is rebuilt and the enjoyment resumed within a reasonable time afterwards.¹ So also it was held that non-user till the year 1810 of a right of access to mines reserved in a grant of land, dated 1704, was not by itself sufficient ground for presuming that the right had been released. Adverse possession, coupled with such non-user, might have raised a presumption of release.^f

If non-user be accompanied by circumstances which clearly show an intention of not resuming the user of an easement, a presumption of a release will generally be implied, and the easement will be lost; but as the intention of not resuming the user has to be shown from the surrounding circumstances, and from the acts of the party presumed to have released his right, it is frequently a question of some nicety whether the circumstances are such that the presumption can be made. It seems, however, not to be so much the actual intention of the owner of the easement that has to be taken into consideration, as the effect which his acts and the accompanying circumstances produce upon the mind of other and reasonable people, for in many cases an owner of an easement at the time he ceases to use

Release,
when pre-
sumed on
cessation
of user.

^d *Ward v. Ward*, 7 Exch. 838; 21 L. J. Exch. 334; *Crossley & Sons (Limited) v. Lightowler*, L. R. 3 Eq. 279; 2 Ch. App. 478; *Mason v. Hill*, 5 B. & Ad. at p. 16; *Darling v. Clue*, 4 F. & F. 329; *Cook v. Mayor of Bath*, L. R. 6 Eq. 177.

^e *Bower v. Hill*, 1 Bing. N. C. 549; *Hale v. Oldroyd*, 14 M. & W. 789; 15 L. J. Exch. 4.

¹ *McLean v. Davis*, 6 Allen (N. B.), 266 (1865).

^f *Seaman v. Vawdrey*, 16 Ves. 390.

it has no particular intention on the subject of abandoning his right ; it may be that the easement is not at the time required, and he does not for a moment consider whether he will at any future time desire to resume its use, but ceases to use it simply because he does not want it at the moment ; his acts may nevertheless induce other persons, including the servient owner, to suppose that he means to abandon his easement entirely, and never to resume its use. In the case of *Moore v. Rawson*^a the facts were, that the plaintiff's predecessors had been owners of a building formerly used as a weaver's shop, in which were ancient lights, and that about seventeen years before the action this building was pulled down, and in its stead a stable erected, having a blank wall on the spot where the ancient lights had been. About three years before the action, and while the plaintiff's stable remained as it had been built, the defendant erected a building next to the blank wall, and the plaintiff thereupon opened a window in the blank wall in the same place where there had formerly been a window in the old shop, and the action was brought for obstruction of that window : it was contended that the non-user was not sufficient to warrant the presumption of a release of the right to have the light uninterrupted ; but it was held that the easement was lost, and Abbott, C. J., said that it seemed to him that if a person entitled to ancient lights pulls down his house and erects a blank wall in the place of a wall in which there had been windows, and suffers that blank wall to remain for a considerable period of time, it lies upon him at least to show that at the time when he so erected the blank wall, and thus apparently abandoned the windows which gave light and air to his house, that was not a perpetual but a temporary abandonment of the enjoyment, and that he intended to resume the enjoyment of those advantages within a reasonable period of time. He thought the burden of showing that laid on the party who had discontinued the use of the light ; and, he added, that by building

^a 3 B. & C. 332 ; 3 L. J. K. B. 32 ; *Drewitt v. Sheard*, 7 C. & P. 465 ; *Lawrence v. Obee*, 3 Camp. 514 ; *Cook v. Mayor of Bath*, L. R. 6 Eq. 177.

the blank wall, the plaintiff might have induced another person to become the purchaser of the adjoining ground for building purposes, and it would be most unjust that he should afterwards prevent such a person from carrying those purposes into effect.

It sometimes happens that there is no other circumstance than non-user for a particular time to determine the question of abandonment.¹ In such an event the duration of the non-user is the principal guide upon which reliance must be placed, but this must be considered not by itself but in conjunction with the nature of the easement in dispute, for non-user of one description of easement for a length of time may lead to a very dissimilar conclusion from non-user of an easement of a different character: thus, non-user of a right of way for twenty years may raise a fair presumption that the right has been abandoned, whereas a case was noticed above in which it was held that non-user for one hundred and six years did not lead to the same presumption.

That an easement acquired *by deed* will not be lost by *mere* non-user, for any length of time is familiar law in the American courts.² But it is equally well settled that a non-user for more than twenty years, *during all which time the servient estate is in the adverse use* and possession of another, claiming

¹ See *Rexford v. Marquis*, 7 Lans. 249. And it is a question of fact for the jury whether the party has abandoned his right. *Parkins v. Dunham*, 3 Strob. 224. The intent to abandon is material to be found as a fact. *Jamaica Pond Aqueduct v. Chandler*, 121 Mass. 3. Upon the question whether a right of way had been abandoned, evidence is admissible against the plaintiff claiming the easement, that his grantor for more than twenty years previous orally relinquished to the owner of the servient tenement all his right to the easement, and afterwards ceased to use it. *Warshauer v. Randall*, 109 Mass. 586.

² *White v. Crawford*, 10 Mass. 183; *Smyles v. Hastings*, 24 Barb. 44; 22 N. Y. 217; *Jewett v. Jewett*, 16 Barb. 150; *Arnold v. Stevens*, 24 Pick. 106; *Bannon v. Angier*, 2 Allen, 128; *Jennison v. Walker*, 11 Gray, 425; *Carlisle v. Cooper*, 4 C. E. Green, 256; 6 Ib. 576; *Barnes v. Lloyd*, 112 Mass. 224; *Owen v. Field*, 102 Mass. 114; *Barlow v. Chicago, &c. Railroad Co.* 29 Iowa, 276; *Noll v. The Dubuque, &c. Railroad Co.* 32 Iowa, 66.

an absolute fee therein, totally inconsistent with the enjoyment of the easement, will work an extinguishment of the easement.¹ It is not easy to see why an easement once fully acquired, though solely by long use, should be lost by mere non-user, any more than if acquired by deed. The long use supposes a grant — *conclusively* supposes a grant; and if so, why is not the title as good, and as unaffected by mere disuse, as if the grant were actually produced. In either case the right is perfect. The non-use in the one case — that of prescription — might be entitled to some weight upon the question whether the prior long use was adverse or only permissive, and therefore might have some tendency to show that no right *had ever been acquired*. But, granting that it had once been fully and completely gained by prescription, it seems difficult to draw a satisfactory distinction between the two cases.²

It has been thought sometimes that as a grant of an easement cannot be presumed unless user has been continued uninterruptedly for twenty years at least, so also that nothing short of twenty years' non-user can raise a presumption of a release of an easement,³ but that does not appear to be a correct notion, for Lord Denman, C. J., in delivering the judgment of the Court of Queen's Bench in the case of *Regina v. Chorley*,⁴ said: "The learned judge appears to have proceeded on the ground that as twenty years' user in the absence of an express grant would have been necessary for the acquisition of the right, so twenty years' cesser of the use in the absence of any express release was necessary for its loss. But we apprehend that as an express release of the easement would destroy it

Abandonment presumed after non-user for less than twenty years.

¹ *Chandler v. Jamaica Pond Aqueduct*, 125 Mass. 549; *Barnes v. Lloyd*, 112 Mass. 224; *Owen v. Field*, 102 Mass. 90; *Jennison v. Walker*, 11 Gray, 423.

² See *Veghte v. Raritan, &c. Co.* 4 C. E. Green, 156; *Tracy v. Atherton*, 36 Vt. 503; *Perrin v. Garfield*, 37 Vt. 304.

³ *Drewett v. Sheard*, 7 C. & P. 465. And see *Emerson v. Wiley*, 10 Pick. 310; *Corning v. Gould*, 16 Wend. 535; *Cuthbert v. Lawton*, 3 McCord, 194; *Wright v. Freeman*, 5 H. & J. 477.

⁴ 12 Q. B. at p. 519.

any moment, so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without any reference to time. . . . It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury. The period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him; and what period may be sufficient in any particular case must depend on all the accompanying circumstances." If there are no circumstances to aid the presumption of a release or the reverse, doubtless no presumption of a release ought to be made until non-user has continued for twenty years, but, as it was said above, there are many cases in which this would not even be sufficient, for the duration of the non-user must always be considered in conjunction with the nature of the easement about which the question is raised.

Release or abandonment of an easement can of course only occur after the easement has been legally acquired, that is, after it has actually become an easement, and it has been pointed out in a previous chapter that an easement cannot be acquired, that is, it cannot actually become an easement under the Prescription Act, unless there has been uninterrupted enjoyment for the full period of twenty years, and that enjoyment has immediately preceded some action or suit.¹ Until that action or suit has been commenced, therefore, no question of abandonment or release can arise, even though the enjoyment may have continued uninterruptedly for a hundred years, if the easement can only be claimed under the Prescription Act; the only question that can then be raised is, whether the easement has been acquired, and to disprove such acquisition it is not necessary to show non-user for twenty or any greater number of years, nor the intention of the *quasi*-dominant owner when he ceased to use the easement, as it is in cases where the ques-

Release, or
abandon-
ment,
when pos-
sible.

¹ *Ante*, chapter II. p. 147. See, also, "Non-user," p. 177.

tion relates to release or abandonment, but it is merely requisite to show that there has been non-user during the last year before the action, irrespectively of the intention with which the user was given up, for that is sufficient to prevent an easement being acquired. If, however, the easement is claimed by express grant or by prescription at common law, no action is required to perfect the title, and the question of abandonment can in no way be influenced by the fact that no action has ever been brought. There has sometimes been a tendency to confuse loss by abandonment, evidenced by non-user, with failure of acquisition of an easement by reason of breach of continuity of enjoyment.

As cessation of user must always be considered in connection with surrounding circumstances to ascertain whether a release of an easement may be presumed, so surrounding circumstances may be given in evidence to explain away the effect of long-continued non-user, and to show that the easement has not been permanently abandoned. Thus it may be shown that the cessation of user occurred in consequence of an agreement whereby the dominant owner consented to give up his right temporarily, as in the case of *Davis v. Morgan*,^k in which a mill-owner had granted to another mill-owner higher up a stream the use of all the water of the stream for a term of ninety-nine years for a certain premium; at the expiration of that term the grantor became entitled to have the stream restored to its former condition, yet although the grantor's mill had been then long pulled down, it having become useless from want of the water, it was considered that the right was not lost by abandonment, and that he was still entitled to rent for the use of the water by the grantee after the expiration of the term.

So, also, it may be shown that the cessation of user occurred in consequence of the temporary substitution of another and a different mode of enjoyment of the easement for the sake of convenience, on proof of which the presumption of a release will be rebutted. Thus, where the owner of an old pond, which was supplied with

Temporary
agreement
to suspend
user.

Substitu-
tion of new
method of
enjoyment.

^k 4 B. & C. 8; *Lovell v. Smith*, 3 C. B. N. S. 120.

water from a well, diverted the water to three new ponds which he made, and suffered the old pond to become filled with mud and useless, it was held that as the use of the old pond was discontinued only because the owner obtained the same, or a greater, advantage from the use of the three new ponds, his easement for the old pond was not lost by abandonment.¹

It should be noticed in this place that a dominant owner always has the power to abandon his easement if he pleases. It may seem that this is so self-evident a fact that it is needless to refer to it, but it has been contended that if the user of an easement is beneficial to the servient owner as well as to the dominant owner, the former can acquire a sort of counter-easement that the dominant owner shall not give up the user, so that the servient owner may not lose the advantage he has been accustomed to enjoy. This point arose in the case of *Mason v. The Shrewsbury and Hereford Railway Company*.^m The defendants or their predecessors had diverted a stream to a canal under the power of an act of parliament. This diversion continued for many years and, during that time, the old bed of the stream partly filled up, so that on the defendants doing away with the canal and restoring the stream to its old course the plaintiff's land was flooded. Cockburn, C. J., held that the plaintiff could not recover, for that it is of the essence of an easement that it exists for the benefit of the dominant tenement alone, and being in its very nature a right created for the benefit of the dominant owner, its exercise by him cannot operate to create a new right for the benefit of the servient owner; and, like any other right, its exercise may be discontinued if it becomes onerous or ceases to be beneficial to the party entitled to it.

¹ *Hale v. Oldroyd*, 14 M. & W. 789; 15 L. J. Exch. 4; *Lovell v. Smith*, 3 C. B. N. S. 120; *Reignolds v. Edwards*, Willes, 282; *Saunders v. Newman*, 1 B. & Ald. 258. And see *Hayford v. Spokesfield*, 100 Mass. 491; *Crain v. Fox*, 16 Barb. 184.

^m L. R. 6 Q. B. 578; 40 L. J. Q. B. 293.

A few remarks are demanded in this chapter relative to revocation of licenses. Licenses.

In the early part of this work the distinction was explained between an easement and a license in the nature of an easement, and it was shown that a mere permission to do an act, which would without permission constitute a trespass, is a license. It has hitherto been unnecessary to make frequent reference to the subject of licenses, for there is little to be said about them after their nature and mode of acquisition is explained; but it is necessary in this place to show how licenses may be revoked, and also in what cases they have been held to be irrevocable.

As a general rule, licenses are revocable at the will of the grantor, for no interest in land is conferred on the grantee by the grant of a license." Revocable and irrevocable licenses. The whole effect of a license is to render an act justifiable which without that license would have been wrong, and if the license is revoked, the effect of the revocation is merely to remove the permission or justification, so that the act again becomes unlawful. There are cases, however, in which the law has determined that licenses shall not be revoked, either on account of the injustice which would be done to the grantee, or on account of the circumstances accompanying the grant of the license. This has been explained in the case of *Wood v. Leadbitter*,^o a case in which the subject of licenses received much consideration. The court there said: "A mere license is revocable, but that which is called a license is often something more than a license; it often comprises, or is connected with, a grant, and then the party who has given it, cannot in general revoke it so as to defeat his grant to which it was incident. It may further be observed, that a license under seal (provided it be a mere license) is as revocable as a license by parol; and, on the other hand, a

^o Though this is so, it has been said that reasonable notice of revocation should be given, especially if it is necessary for the licensee to do something, as to remove goods or alter the direction of pipes or bell-wires on revocation of the license. *Mellor v. Watkins*, L. R. 9 Q. B. 400.

^o 13 M. & W. at p. 844; 14 L. J. Exch. at p. 164.

license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license; it is not an incident to a valid grant, and it is therefore revocable." So, a deed which granted a liberty, license, power, and authority to dig for tin, and to dispose of the tin obtained, on certain terms for a period of twenty-one years, was described by Abbott, C. J., as granting a license only to take the ore which should be found, and not conferring any estate or interest in the rest of the soil; but the license was also said to be irrevocable on account of its carrying an interest in the ore.² This is probably on the ground that the license is coupled with an interest in personal property, or in property which is to be made personal by the licensee; for where this is done, as where trees have been cut by the licensee on land of the licensor under an oral purchase thereof, the licensee has an irrevocable license to enter and remove the property in which he had thus acquired an interest.¹ So, also, where the grantee of a right of way from his coal pit, who had constructed a wagon-way, agreed that another coal-owner should also use the wagon-way, the latter acquired a license only to use the way as the former had a right merely to carry his own coals; but, subsequently, the owner of the soil granted by deed to the second coal-owner a right of way over the same road and wagon-way where he previously had a mere license to pass, and afterwards the owner of the soil became owner of the first grantee's coal-pits, and so of his wagon-way, and it was decided that though, as between the two grantees the second coal-owner had merely a license to use the wagon-way, yet that the grantor, who had become assignee of his grantee, could not revoke the license to use the wagon-way, for by so doing he would defeat his own grant.³

² *Doe v. Wood*, 2 B. & Ald. at p. 738.

¹ See *Nettleton v. Sikes*, 8 Met. 34; *Claffin v. Carpenter*, 4 Met. 580; *Giles v. Simonds*, 15 Gray, 441.

³ *Newmarsh v. Brandling*, 3 Swan. 99.

A license is also irrevocable if the licensee, acting upon the permission granted, has executed a work of a permanent character, and has incurred expense in its execution.¹ This rule of law appears to be based upon the injustice which would be inflicted upon the licensee if, after he had laid out money and had executed a permanent work, the licensor were permitted to revoke his license and make him destroy his work, and so lose the money expended, or if he were allowed to treat him as a wrong-doer and recover damages for the very act for which he gave permission. Thus, in *Winter v. Brockwell*² the action was brought for inclosing an area through which the plaintiff was entitled to receive light and air, and it appeared in evidence that the area belonged to the defendant, and that he erected the inclosure with the express consent and approbation of the plaintiff, and it was held that after that consent to the erection the plaintiff could not maintain the action. Lord Ellenborough, C. J., said that the point was new to him when it occurred at the trial, but he then thought it very unreasonable, that after a party had been led to incur expense in consequence of having obtained a license from another to do an act, and the license had been acted upon, the other should be permitted to recall his license and treat the first as a trespasser for having done that very act. He also said that he had afterwards looked into books upon the point, and found himself justified by the case of *Web v. Paternoster* (Palmer's Rep. p. 71), where Haughton, J., lays down the rule that a license executed is not countermandable, but only when it is executory.

Execution of a work of a permanent and expensive character.

¹ See *Rawson v. Bell*, 46 Ga. 19; *Miller v. Brown*, 33 Ohio St. 547.

² 8 East, 308; *Liggins v. Inge*, 7 Bing. 682; 9 L. J. C. P. 202; *Wallis v. Harrison*, 4 M. & W. 538; 8 L. J. N. S. Exch. 44; *Rochdale Canal Co. v. King*, 2 Sim. N. S. 78; 20 L. J. Ch. 675; 16 Beav. 630; 22 L. J. Ch. 604; *Duke of Devonshire v. Eglin*, 14 Beav. 530; 20 L. J. Ch. 495; *Laird v. Birkenhead Railway Co.* John. 500; 29 L. J. Ch. 218; *Hervey v. Smith*, 22 Beav. 299; *Bankart v. Tennant*, L. R. 10 Eq. 141; *Mold v. Wheatcroft*, 27 Beav. 510; 29 L. J. Ch. 11.

IN AMERICA,

also, it is now generally agreed that inasmuch as an easement in real estate cannot be created except by actual deed, or prescription, which conclusively presumes a grant, a parol license, sufficient in terms to create an easement if in a deed, is revocable, although executed by the licensee;¹ although some early cases seem not to have given full force to this view, when the license has been executed.²

The authorities generally referred to on this subject show that the rule sometimes laid down in the books, that a license executed can not be countermanded, is not applicable to licenses which, if given by deed, would *create* an easement; but only to licenses which, if given by deed, would *extinguish* or *modify* an easement. They also show that the distinction, sometimes taken in the books, between a license to do acts on the *licensee's* own land, and a license to do acts on the *licenser's* land is the same distinction that is made between licenses which, if held valid would create, and licenses which extinguish or modify an easement. Generally, if not always, a license which, when executed, extinguishes or modifies an easement, is, from the nature of the case, a license to do acts on the servient estate, the estate of the licensee.³

Thus, in *Morse v. Copeland*⁴ the owner of a mill-dam and privilege gave the owner of lands above flowed thereby, an oral license to build a dam on his (the licensee's) land, and

¹ *Morse v. Copeland*, 2 Gray, 302; *Foster v. Browning*, 4 R. I. 47; *Couch v. Burke*, 2 Hill S. C. 534; *Hetfield v. Central Railroad Co.* 3 Dutch. 571; *Eggleston v. N. Y. Railroad Co.* 35 Barb. 162; *Pitman v. Poor*, 38 Me. 237; *Woodward v. Seeley*, 11 Ill. 157; *Desloge v. Pearce*, 38 Mo. 588; *Wolfe v. Frost*, 4 Sandf. Ch. 72; *Den v. Baldwin*, 1 Zab. 390, and many other cases.

² See *Ricker v. Kelly*, 1 Me. 117; *Clement v. Durgin*, 5 Me. 9; *Woodbury v. Parshley*, 7 N. H. 237; *Androscoggin Bridge v. Bragg*, 16 N. H. 506; *Wilson v. Chalfant*, 15 Ohio, 248; *Occum Man. Co. v. Sprague Man. Co.* 34 Conn. 529; *Miller v. Brown*, 33 Ohio St. 547.

³ See *Curtis v. Noonan*, 10 Allen, 406.

⁴ 2 Gray, 302. And see *Dyer v. Sanford*, 9 Met. 395; *Dodge v. McClintock*, 47 N. H. 386; *Veghte v. Raritan, &c. Co.* 4 C. E. Green, 153; *Houston v. Laffee*, 46 N. H. 505; *Duinneen v. Rich*, 22 Wis. 550.

also to dig a ditch across the land of the licensor, to drain the water from part of the licensee's land ; and under this license the licensee erected the dam and dug the ditch. It was held that the licensor could, even after twenty years, revoke the license to dig the ditch on his own land, but could not revoke the license to build the dam on the licensee's land.

So it is well settled that a license to a person to build a dam on the licensor's own land, for the purpose of raising a head of water to work a mill on land of the licensee, is revocable at the pleasure of the licensor, even after the licensee has erected the dam ; and no liability thereby arises to reimburse the licensee for the expenses incurred by him.¹

In like manner, if a landowner orally consents that a person, who is about to build a mill-dam on his land may flow the licensor's land with his pond, and the licensee thereupon erects his mill and dam, the licensor may, nevertheless, revoke his license.²

If A. orally licenses B. to erect a building on his land, without consideration, and B. does so, such license is revocable, notwithstanding the expense B. has incurred,³ and the license would terminate with the licensor's death or subsequent conveyance of the land.

If A. orally licenses B. to lay an aqueduct through his land, A. may revoke the license, even after the aqueduct has been laid,⁴ and especially after the same has decayed, and

¹ See *Stevens v. Stevens*, 11 Met. 251 ; *Cook v. Stearns*, 11 Mass. 533 ; *Mumford v. Whitney*, 15 Wend. 380 ; *Carter v. Harlan*, 6 Md. 20 ; *Hayes v. Richardson*, 1 Gill & J. 866.

² *Wood v. Edes*, 2 Allen, 578 ; *Bridges v. Purcell*, 1 Dev. & Batt. 492 ; *Foot v. N. H. and Northampton Co.* 23 Conn. 225. But if the mill-owner had a right *by statute* to flood the licensor's land, and he orally consented for a valuable consideration that he might flow upon paying a certain sum annually as damages, that license, if it be one, could not be revoked, and a higher rate claimed. *Seymour v. Carter*, 2 Met. 520.

³ *Mason v. Holt*, 1 Allen, 45 ; *Cheever v. Pearson*, 16 Pick. 266 ; *Prince v. Case*, 10 Conn. 375. And see *Ruggles v. Lesure*, 24 Pick. 187 ; *Harris v. Gillingham*, 6 N. H. 9 ; *Seidensparger v. Spear*, 17 Me. 123 ; *Carter v. Harlan*, 6 Md. 29 ; *Whitaker v. Cawthorne*, 3 Dev. 389.

⁴ *Houston v. Laffee*, 46 N. H. 505.

the licensee has enjoyed the full benefit of his first expenditure.¹

So of a verbal license to pass over the licensor's grounds, and although the licensee has exercised the right for eight or ten years without objection, it may be revoked, and he would be liable in trespass for passing afterwards; ² so of a license to build a railroad over the land of the licensor.³

If a landowner orally licenses another to cut and carry away the standing trees on his ground, for a valuable consideration, such license may at any time be revoked as to all *trees not then cut*, even though the licensee had incurred expense in preparing to act upon the license.⁴

These illustrations, and many others might be cited, show that the language of the learned author should not be understood as asserting that *every* oral license is irrevocable, merely because the licensee has incurred expenses relying upon the continuance of the license, and that although the licensor may not have an action against the licensee *for what he has done* under it, before revocation, yet he may be forbidden *to continue* such acts thereafter. Some courts, however, hold that executed licenses become binding in *equity* upon the licensor, when the licensee has incurred expense on the faith of it.⁵

Unless a license is irrevocable from the peculiar circumstances of the case, it may be revoked at any time by the grantor, and for the purpose of revocation it is not necessary that he should expressly countermand his license, but it must be taken to be revoked if he

Revocation
by adverse
act of the
grantor.

¹ Allen v. Fiske, 42 Vt. 462. And see Carleton v. Redington, 21 N. H. 291; Selden v. Delaware and Hudson Canal Co. 29 N. Y. 634.

² Marston v. Gale, 24 N. H. 176.

³ Blaisdell v. Portsmouth, Great Falls and Conway Railroad, 51 N. H. 483; Miller v. Auburn and Syracuse Railroad Co. 6 Hill, 61.

⁴ Giles v. Simonds, 15 Gray, 441; Drake v. Wells, 11 Allen, 141; Hill v. Hill, 113 Mass. 103; Hill v. Cutting, 113 Mass. 107; Baker v. Wheeler, 8 Wend. 505.

⁵ See 2 Am. Lead. Cas. 578; Rerick v. Kern, 14 S. & R. 267; Lasy v. Arnett, 33 Penn. St. 169; Snowden v. Wilas, 19 Ind. 14, 369; Wickersham v. Orr, 9 Iowa, 260; Beatty v. Gregory, 17 Iowa, 114; Swartz v. Swartz, 4 Barr, 358.

does any act by which his disinclination to the continuation of its enjoyment is shown, or if he puts it out of his power to continue the permission. Thus, the act of locking a gate across a way may operate as a revocation of a license to use the way,^s and if an owner of land grants another person license to put hay on his ground, the license must be considered revoked if the owner lets or sells the land to a third person.^t In the case of *Wallis v. Harrison*,^u Parke, B., said, that if the owner of land grants to another a license to go over or do any act upon his close, and then conveys away the close, there is an end to that license; for the license is an authority only with respect to the soil of the grantor, and if the close ceases to be his soil the authority is instantly gone. Lord Abinger, C. B., also in the same case, said, that a mere parol license to enjoy an easement on the land of another, does not bind the grantor after he has transferred his interest and possession in the land to a third person. He added that he never heard it supposed that if a man out of kindness to a neighbor allowed him to pass over his land, the transferee of that land is bound to do so likewise; he stated, moreover, that it is not necessary to give notice of the transfer of the land in order to terminate the license, for a person is bound to know who is the owner of the land upon which he does that which *prima facie* is a trespass.

The difference which exists between easements and natural rights as to suspension and extinction being understood, it is next to be ascertained in what cases these rights can be revived, and when they are so entirely destroyed as to render their revival impossible; and it may be stated generally that any right which is merely suspended revives when the cause of the suspension is removed, but that any right which is altogether extinguished can never revive, though a similar right may be granted at any time subse-

Revival of
easements
and nat-
ural rights.

^s *Hyde v. Graham*, 1 H. & C. 593; 32 L. J. Exch. 27.

^t *Plummer v. Webb*, Noy's Rep. 98; *Drake v. Wells*, 11 Allen, 141; *Judge v. Lowe*, Irish R. 7 C. L. 291.

^u 4 M. & W. 538; 8 L. J. N. S. Exch. 44.

quent to the extinguishment, unless prevented by the cause of the previous extinction. Thus natural rights, which can be suspended only and not extinguished by the creation of an adverse easement, immediately revive if the easement is removed; and so it is presumed they would revive on the repeal of an act of parliament by which they had been previously suspended. The case of easements is the same, for if they be merely suspended they will revive, though they cannot revive if once extinguished. This was pointed out by Tindal, C. J., in *Bower v. Hill*,^v in which the court held that the fact of severance of the property in a certain inn and an adjoining yard would not produce a presumption of release of a right of way appurtenant thereto, for that there was evidence only of a temporary discontinuance of the enjoyment, or at most of a temporary suspension of the right and not of any extinguishment of it, and that consequently if the property in the dominant tenement was reunited at any time, the dominant owner would be at liberty to resume the user.

The different effect of unity of seisin, of dominant and servient estates, and unity of possession, merely for different estates and interests, as to extinction and suspension of easements, has been pointed out; if there has been unity of possession merely, and not unity of seisin for estates in fee simple, an easement which has been thereby suspended will revive on severance of the union,^w but if there has been unity of seisin for estates in fee simple, and not unity of possession merely, all easements are absolutely extinguished, and will not revive on partition of the former dominant and servient estates, though they may be created *de novo* if the servient owner pleases, and if proper words for that purpose be used in the deed by which the partition is effected.^x When easements are thus recreated they are in fact not the old rights

^v 2 Bing. N. C. 339; 5 L. J. N. S. C. P. 77; *James v. Plant*, 4 A. & E. at p. 762; 6 L. J. N. S. Exch. 260.

^w *Thomas v. Thomas*, 2 C., M. & R. 34; *Simper v. Foley*, 2 John. & H. 555; *Whalley v. Thomson*, 1 B. & P. 371.

^x *Barlow v. Rhodes*, 1 C. & M. 439; 2 L. J. N. S. Exch. 91; *Pearson v. Spencer*, 1 B. & S. 571; *Heigate v. Williams*, Noy's Rep. 119.

revived, but newly created servitudes, and the means by which they are recreated is a new grant. This subject was fully considered in an earlier chapter, when acquisition by means of grant was discussed, and it is needless again to describe the forms of words whereby extinguished easements may be created afresh on partition of a united estate.^v

SECT. 2. — *On Extinction, Suspension, and Revival of Particular Easements.*

There are but few rules of law relating to extinction, suspension, and revival of easements which have reference to those particular easements which have been specially and separately considered throughout this work, viz., those which have relation to air, light, support, water, and ways. Those rules and principles which have been treated in the first section of this chapter relate to easements of all kinds, and it is only in cases of rights to light, support, and ways, that any special principles of law demand notice which relate exclusively to those particular rights. These principles will now be considered.

LIGHT.

It frequently becomes a question of some difficulty whether a right to light is entirely lost by abandonment, when ancient lights have been closed by the owner of a building, or whether he is to be deemed merely to have closed his windows for a temporary purpose, so as to be entitled to reopen them at a future time if he again has need of the light. The easement of light, which is an easement of a negative character — that is, not one by which the dominant owner is entitled to do something on the servient estate, but one by which the servient owner is restrained from doing something on his own land for the benefit of the dominant owner — differs from rights of way and other easements of a positive character, in this — positive easements have their origin in a grant, by which some right is conferred by the servient on the dominant owner, whereas a right to light orig-

Loss by
abandon-
ment.

^v See, *ante*, chapter II. pp. 98-108; *Ferguson v. Whitsell*, 5 Rich. L. 281.

inates, not, strictly speaking, in a grant, but rather in a covenant by the servient owner not to build on his own land so as to obstruct his neighbor's light.² To destroy an easement of a positive character by abandonment, non-user must be of such a character that a release of the right granted can be presumed, but no release of a right need, or indeed can, be presumed in the case of light, for there is no right to reconvey, but, instead, the servient owner must be released from his obligation not to build created by his implied covenant.

It has been thought, that as twenty years' user is requisite to render a grant capable of being presumed, so twenty years' non-user is requisite to raise a presumption of release of an easement; but this, as has already been shown, is not so, for the possibility of presuming a release depends much more on the character of the non-user, and the accompanying circumstances, than on its duration.^a In the case of *Stokoe v. Singers*^b the facts were, that there had been ancient windows in the plaintiff's warehouse, guarded by iron bars, that the owner of the warehouse had blocked up the windows inside with rubble and plaster, but had left the bars outside, so that to a spectator from the outside it was obvious that windows had existed. The windows remained in that condition for nineteen years, and then the owner of the land in front of the windows began to build in such a manner that the plaintiff would have been wholly prevented from again opening his windows for the reception of light. To try the question of abandonment, the defendant erected a hoarding so as to obstruct the windows, and the action was brought for that obstruction. The summing up of the learned judge, Martin, B., who tried the cause, which was afterwards approved by the Court of Queen's Bench, was to the effect that closing the windows, with the intention of never opening them again, would operate as an abandonment and destroy the right, but that closing them for

^a There are other easements of a negative character besides light, to which these remarks apply.

^a See *ante*, p. 465.

^b 8 E. & B. 31; 26 L. J. Q. B. 257.

a mere temporary purpose would not have that effect. He also stated, that though the person entitled to have light uninterrupted might not really have abandoned his right, yet, if he manifested such an appearance of having abandoned it as to induce the owner of the adjoining land to alter his position in the reasonable belief that the right was abandoned, there would be a preclusion as against him from claiming the right. On this ruling the jury found in favor of the plaintiff, and the Court of Queen's Bench subsequently discharged a rule for a new trial on the ground of misdirection. Again, in the case of *Moore v. Rawson*,^c the plaintiff possessed a building, used as a weaver's shop, in which there had been ancient lights. About seventeen years before the action, the then owner took down the old building and erected a stable, which had a blank wall in the place of that which had contained the ancient lights. Three years before action the defendant erected a building next to the blank wall, and the plaintiff then opened a window in that wall in the same place where one of the ancient lights had been situate, and the action was brought for obstruction of that window, and it was decided that the action could not be maintained, as the right to light had been lost by abandonment. Abbott, C. J., said, that it seemed to him that if a person entitled to ancient lights pulls down his house, and erects a blank wall in the place of a wall in which there had been windows, and suffers that wall to remain for a considerable period of time, it lies upon him, at least, to show that at the time when he so erected the blank wall, and thus apparently abandoned the windows which gave light and air to the house, that was not a perpetual but a temporary abandonment of the enjoyment, and that he intended to resume the enjoyment of those advantages within a reasonable period of time. He thought that the burden of showing that lay on the party who had discontinued the use of the light. By building the blank wall he may have induced another person to become the purchaser of the adjoining ground for building purposes, and it would be most unjust that he should afterwards prevent such a person from carrying those purposes into effect.

^c 3 B. & C. 332; 3 L. J. K. B. 32.

Another point which has given rise to considerable difficulty is, the effect on rights to light caused by altering the position of or enlarging windows to which a right to light belongs. Owing to the recent decision in the case of *Tapling v. Jones*, in the House of Lords, already alluded to with reference to rights acquired under the Prescription Act, a difference seems to exist between the effect produced on prescriptive rights to light and rights acquired by grant.

With respect to rights acquired by grant a material alteration in the position or size of a window may probably effect the destruction of a right to light though a trifling alteration will not do so. If a right is created by grant it may be that the grantor intends his grantee only to have his window in the exact position or of the exact size it is at the time of the grant, for that may not be objectionable to him, whereas any alteration may cause him substantial injury. On this subject a case, which was decided before the distinction between rights acquired by grant and rights acquired by prescription was established, is in point, and without entering on the facts of the case, which were somewhat complicated, it is only necessary to refer to a part of the judgment of the court, which was delivered by Patteson, J. After referring to the arguments, he continued: "With respect to the western window, the part of the house in which it is placed had no existence till after the conveyance of 1822; the land on which the structure was afterwards raised had, up to that time, been used only as a passage. As to the windows at the east, the case finds that they do not occupy the places of the old windows; the wall in which those windows were, no longer exists; and assuming that no greater change of position has been made than is necessarily consequent upon a carrying out of the walls five feet and converting the termination into a bow, such a change is, in our opinion, sufficient to prevent their being clothed with the same rights as the former windows. In whatever way precisely the right to enjoy the unobstructed access of light and air from adjoining land may be acquired (a question of admitted

nicety), still the act of the owner of such land from which the right flows must have reference to the state of things at the time when it is supposed to have taken place; and as the act of the one is inferred from the enjoyment of the other owner, it must in reason be measured by that enjoyment. The consent, therefore, cannot fairly be extended beyond the access of light and air through the same aperture (or one of the same dimensions and in the same position) which existed at the time when such consent is supposed to have been given. It appears to us that convenience and justice both require this limitation; if it were once admitted that a new window varying in size, elevation, and position might be substituted for an old one without the consent of the owner of the adjoining land it would be necessary to submit to juries questions of degree, often of a very uncertain nature, and upon very uncertain evidence. And in the same case a party who had acquiesced in the existence of a window of a given size, elevation, or position, because it was felt to be no annoyance to him, might be thereby concluded as to some other window to which he might have the greatest objection, and to which he would never have consented if it had come in question in the first instance.”^d

Rights to light acquired by prescription have now been determined to stand upon a different footing altogether from rights acquired by grant. Much has already been said on this subject, and many allusions have been made to the case of *Tapling v. Jones*,^e in which the law relating to prescriptive rights to light was shown by the House of Lords to be very different from what it had previously been supposed to be. For the purpose of the present chapter, all that need be said about that case is, that it was

Effect on
rights ac-
quired by
prescrip-
tion.

^d *Blanchard v. Bridges*, 4 A. & E. at p. 190; 5 L. J. N. S. K. B. at p. 83.

^e 11 H. L. C. 290; 34 L. J. C. P. 342. In the case of *Chandler v. Thompson* (3 Camp. 80), *Le Blanc, J.*, held the law respecting alteration of ancient windows to be the same as it was subsequently held to be in the case of *Tapling v. Jones*, although *Chandler v. Thompson* was decided long before the passing of the Prescription Act.

there determined that the owner of an ancient light does not lose his right merely from the circumstance that he has opened new windows close to the ancient light, or that he has altered the size and position of the latter — that is, always assuming that some portion of the altered window corresponds with some portion of the ancient light; for the ancient right can never be said to attach to a portion of a window in an entirely new situation. It should be noticed, however, that in the case of *Tapling v. Jones*, Lord Chelmsford, while agreeing with the general principles laid down by the other lords, remarked that it will of course be a question in each case whether the circumstances satisfactorily establish an intention to abandon altogether the future enjoyment and exercise of the right, for if such an intention is clearly manifested, the adjoining owner may build as he pleases upon his own land; and should the owner of the previously existing window restore the former state of things, he could not compel the removal of any building which had been placed upon the ground during the interval, for a right once abandoned is abandoned forever. In the recent case of *National Provincial Plate Glass Ins. Company v. Prudential Assurance Company*,¹ it was held, explaining *Tapling v. Jones* and *Blanchard v. Bridges*,² that where a building containing ancient lights is pulled down, and replaced by another, in which the front is set back, and a dormer window converted into a sky-light, the right to access of light is not lost by the change thus made.

The question of loss of rights to light by non-user was also referred to by the lord chancellor in the case of *Non-user. Tapling v. Jones*, and that is a point which requires notice in this place. It has been said that questions relating to abandonment can only arise after an easement has been actually acquired — that is, after the right, if claimed under the Prescription Act, has been brought into question in some suit or action, for unless some suit or action relating to the right has arisen, the question cannot be one respecting abandonment, but it will be whether the user has been sufficient

¹ 6 Ch. D. 757 (1877).

² 4 A. & E. 176.

for the acquisition of the right. The remark of the lord chancellor, to which attention is now directed, was, that "after an enjoyment of an access of light for twenty years without interruption, the right is declared by the statute to be absolute and indefeasible; and it would seem, therefore, that it cannot be lost or defeated by a subsequent temporary intermission of enjoyment not amounting to abandonment." In this expression of opinion it would appear as if his lordship thought a difference exists between rights to light and rights to other easements in this respect, owing to the peculiar form of the third section of the act, but it is thought no such difference really exists, for whether it be that after twenty years' enjoyment a right to light is to be deemed absolute and indefeasible under the third section of the act, or whether it is that after a like period of enjoyment no way or other matter is to be defeated, by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, each of those periods, it is declared in the fourth section of the statute, is to be deemed and taken to be the period next before some suit or action; until such suit or action, therefore, a right to light does not become absolute and indefeasible, neither is a prescriptive title to a way acquired under the second section of the act; and in either case non-user before the suit or action would raise the question of interruption or of breach of continuity of user sufficient to defeat prescription, and after the suit or action neither right could be defeated by non-user unless it amounted to abandonment of the easement.

Destruction of a building is not of itself sufficient to put an end to a right to light, for, as was before observed, the question of abandonment is to be decided, not alone from the fact of non-user but rather from the intention of the dominant owner when he ceases to use his right, and his intention must always be discovered from surrounding circumstances. In *Moore v. Rawson* the destruction of a dominant tenement with ancient windows, and the erection of a different kind of building with a blank

Restoration
of ancient
lights in
new build-
ings.

wall in the place of the ancient lights, was held to have destroyed the right to light after a period of seventeen years, because the intention of the dominant owner to abandon his right was apparent from his acts, but if a dominant owner pulls down his house and erects another with lights in the same position as the ancient windows of the old building, he does not from that circumstance lose his right to light, but the easement attaches to the windows of the new building when erected.⁹

SUPPORT.

It has been a matter of doubt whether the placing of an artificial weight on land so as to impose a greater pressure on the subjacent or adjacent soil of other persons than that which previously existed has not the effect of destroying, or, at all events, of suspending, the natural right to support to which the landowner was entitled before the artificial weight was imposed; and the same doubt may be raised with regard to the easement of support, for if the owner of a house who has acquired a right to support increases the pressure on his neighbor's land by increasing the height of his building, does he lose his right to that amount of support to which he was previously entitled, or is the servient owner still bound not to excavate in his land in a manner such as would have caused the fall of the building, supposing the weight had not been increased? There can be no doubt that no greater obligation can be cast on the servient owner by the act of imposing the additional weight than that to which he was previously liable — that is, he cannot be compelled to support the additional weight until an easement has been gained in that behalf, but it has now been determined that the natural right to support is not suspended if the additional weight of buildings is imposed on the dominant land, though no action can be maintained against the servient owner for excavating and causing the land and buildings to sink, if the sinking would not have occurred had the buildings not been erected.

⁹ *Curriers' Co. v. Corbett*, 2 Dr. & Sm. 355.

On the other hand, if the newly erected buildings were not the primary cause of the sinking — that is, if the land would have sunk equally when the excavation was made even though no buildings had been there, the servient owner may be sued for his wrongful act in removing the support to which the dominant owner was entitled of natural right, and compensation may also be recovered for the injury caused to the buildings as consequential damages.^a As, then, the effect of building on land is not to suspend the natural right to support, why should the fact of increasing the weight of an ancient building have the effect of depriving the owner of his right to that degree of support to which he was entitled before he increased the weight? The point appears not yet to have been decided, but it would seem that the only effect of so building would be to deprive the householder of a right of action if the injury arose through the weight of his house having been increased.

Effect on
an ease-
ment of
support.

WAYS.

Besides the several means by which all easements may be destroyed, and which have been noticed in the first section of this chapter, a private right of way may be extinguished by the creation of a public right of way over the same road subsequently to the acquisition of the private right; but though a private right *may* thus be destroyed it does not follow that destruction of the easement is the inevitable result of the creation of the public right, for the two may coexist, and unless the dominant owner abandons or releases his right, his easement is not destroyed. In the case of *Regina v. Chorley*¹ the defendants claimed a private right of way along a lane over which the public had gained a right of passage subsequently to the creation of their

Extinction
on creation
of public
ways.

^a *Brown v. Robins*, 4 H. & N. 186; 28 L. J. Exch. 250; *Stroyan v. Knowles*, 6 H. & N. 454; 30 L. J. Exch. 102. See, however, *Smith v. Thackerah*, L. R. 1 C. P. 564; 35 L. J. C. P. 276; *Wyatt v. Harrison*, 3 B. & Ad. 871. And the American rule is opposed to *Brown v. Robins* on this point. See *Gilmore v. Driscoll*, 122 Mass. 199; *Thurston v. Hancock*, 12 Mass. 220; *Foley v. Wyeth*, 2 Allen, 131.

¹ 12 Q. B. 515.

easement, and one question in the case was, whether the defendants' private right was lost. The court said that "assuming the defendants' to have been the prior right, theirs was the dominant tenement, the lane was the servient tenement: the owner of this last, then, could not dedicate absolutely to the public so long as it remained subject to the prior right; he could give nothing but what he himself had, a right of user not inconsistent with the defendants' easement. The question, therefore, Has the owner effectually made an absolute dedication to the public? necessarily involves this: Has the defendant released the right which he enjoyed?"

Ways of necessity are coextensive with the necessity; they arise by implied grant, and such grant continues while the necessity lasts; but if the necessity comes to an end, the right of way is extinguished. It is true that during the argument in the case of *Proctor v. Hodgson*,^k Parke, B., observed: "The extent of the authority of *Holmes v. Goring* is, that admitting a grant in general terms, it may be construed to be a grant of a right of way as from time to time may be necessary. I should have thought it meant as much a grant forever as if expressly inserted in a deed, and it struck me at that time that the court was wrong; but that is not the question now;" but this expression of opinion, coming even from Parke, B., cannot be taken to overrule the case of *Holmes v. Goring*^l and the principles of law there established. In that case the facts were that the defendant was seised of two closes of land, between which lay two other closes belonging to the plaintiff, and over these the defendant enjoyed a right of way of necessity from one of his closes to the other, as the latter was otherwise without means of approach. Subsequently, the defendant became possessed of another piece of land adjoining, over which he might have passed, instead of using the old way over the land of the plaintiff, and the question was whether the right of way of necessity came to an end when the defendant acquired the possibility of getting to his ground without using the road

^k 10 Exch. at p. 828.

^l 2 Bing. 76; 2 L. J. C. P. 134.

over his neighbor's soil, and it was held that it did, for that the right terminated with the necessity. Best, C. J., said, "If I have four fields, and grant away two of them over which I have been accustomed to pass, the law will presume I reserve a right of way to those which I retain: but what right? The same as existed before? No; the old right is extinguished, and the new way arises out of the necessity of the thing. The passage which has been cited from Serjeant Williams's note contains a complete answer to the argument on the part of the defendant: 'A way of necessity, when the nature of it is considered, will be found to be nothing else than a way by grant;' but a grant of no more than the circumstances which raise the implication of necessity require should pass." . . . "A grant, therefore, arising out of the implication of necessity cannot be carried farther than the necessity of the case requires, and this principle consists with all the cases which have been decided."

THE AMERICAN LAW.

In America, too, it is well settled, in conformity with *Holmes v. Goring*, that a right of way by necessity ceases with the necessity; and, therefore, if the owner of such a right subsequently acquires another avenue to the highway, either by purchase, by prescription, by the laying out of a public highway to his premises,¹ and *a fortiori* by the purchase of the intervening land,² the former way by necessity is extinguished. The same result would seem to follow if he has had a private way laid out for him by the public authorities, at his own expense, as some states allow; for this might be considered only a statutory purchase, and attended with the same consequences as a voluntary purchase; but this point may not have been, as yet, judicially determined.

Whether a former way by necessity would revive upon the loss or termination of a subsequent way which had been subsequently acquired, and thus terminated the former way of necessity, is at least doubtful. In *Baker v. Crosby*³ it was

¹ *Abbot v. Stewartstown*, 47 N. H. 230.

² *Baker v. Crosby*, 9 Gray, 424; *Viall v. Carpenter*, 14 Gray, 126.

³ 9 Gray, 421.

held that if one having a way by necessity over the land of another, subsequently acquires another way to the same highway over another tract, and afterwards conveys away the last lot, his former right of way is not thereby revived.

Union of seisin causes extinction of a way of necessity as it does of any other easement, for the right of passage on union ceases to be an easement, and becomes one of the ordinary rights of property; if, therefore, the original dominant and servient tenements are again, after union, severed by sale or otherwise, the original right does not revive, but a new way of necessity is granted by implication if the necessity continues.^m

Extinction
of ways of
necessity
on union of
seisin.

Re-crea-
tion of
right on
severance.

In order to extinguish a right of way by the unity of title and possession of the dominant and servient tenements in one person, the estates thus united must be respectively equal in duration, and not liable to be again disjoined by act of law. Accordingly, it is not extinguished by the vesting of both estates in the same person by two separate mortgages, from the respective owners of the two estates, until such mortgages are both fully foreclosed and the mortgagee's title to each is complete and perfect.¹ Nor is the easement extinguished if the title to the land itself is essentially defective.²

Rights of way may also be extinguished or lost by an abandonment. But the mere non-user of a right of way acquired *by deed*, for any length of time, will not,

^m *Pheysey v. Vicary*, 16 M. & W. per Parke, B., at p. 491; *Holmes v. Goring*, 2 Bing. 76; 2 L. J. C. P. 134. In *Atwater v. Bodfish*, 11 Gray, 151, this rule was applied to a right of way by *prescription*, and in which the owner of the dominant tenement purchased the servient estate, and subsequently sold the same, but without reserving any way in his deed; and it was held he no longer had any right from his former lot. But a private way laid out by public authorities in Massachusetts, under St. 1786, c. 67, is not extinguished or discontinued merely by the purchase of the land through which it runs, by the party for whom it was laid out, for in that state such ways are not merely private ways, but are *quasi* public. *Flagg v. Flagg*, 16 Gray, 175; *Denham v. County Commissioners*, 108 Mass. 202.

¹ *Ritger v. Parker*, 8 Cush. 145. And see *Ballard v. Ballard Vale Co.* 5 Gray, 471.

² *Tyler v. Hammond*, 11 Pick. 220.

in and of itself, unconnected with any proof of an adverse enjoyment by the owner of the servient estate, of the land or soil under such way necessarily amount to an abandonment.¹

And in *Hayford v. Spokesfield*, 100 Mass. 491, it was held that even maintaining a board fence five feet high by the owner of the dominant tenement across the opening or mouth of the way for a period of seven years was not *necessarily* an abandonment or loss of the right of way so as to prevent its enjoyment afterwards by removing the fence. Chapman, C. J., said: "The right cannot have been lost by mere non-user; for the doctrine of extinction by mere disuse does not apply to an easement acquired by deed. Washb. on Easements (2d ed.), 641, and cases cited. There must be something more than this. In this respect, it differs from an easement acquired by prescription. In *Dyer v. Sanford*, 9 Met. 395, 402, it is said that the acts of the owner of the dominant tenement must be of so decisive and conclusive a character as to indicate and prove his intent to abandon the easement. In several cases, the effect of particular acts has been discussed. *Stokoe v. Singers*, 8 El. & Bl. 31, is a strong case of the closing of windows from 1837 to 1856, in which it was held that the easement of light had not thereby been lost. The obstruction was of a permanent character, and would not be likely to decay within twenty years; whereas, in this case, the board fence could be removed with hardly any trouble or expense, and would be likely to decay in a few years. In *Ward v. Ward*, 7 Exch. 838, it was held that discontinuing the use of a way merely by reason of the party's having a more convenient way was not evidence of abandonment. In *Lovell v. Smith*, 3 C. B. N. S. 120, it was held that the substitution of a new way for an old one by agreement, and a consequent discontinuance of the use of the old way, afforded no evidence of the abandonment of the old one. In *Hale v. Oldroyd*, 14 M. & W. 789, a similar doctrine was held. In the present case, the use of the ten-foot way was substituted for that of the

¹ *Bannon v. Angier*, 2 Allen, 129; *Barnes v. Lloyd*, 112 Mass. 231. And see *Arnold v. Stevens*, 24 Pick. 111; *Jennison v. Walker*, 11 Gray, 423; *Owen v. Field*, 102 Mass. 114.

three-foot way. The case of *Crain v. Fox*, 16 Barb. 184, is cited, in which the existence of certain facts was held to constitute an abandonment; but it was a very different case from this. The erection of the fence, and the addition of pales to it afterwards would serve to keep the animals of the owner from escaping, and the animals of his neighbors from entering upon his lot, and the ten-foot way could not have been a very inconvenient substitute for the other; and so many motives may be assigned for maintaining the fence temporarily, and the structure was so slight and so easily removed, that it is far from being sufficient of itself to prove an abandonment of the easement."

By change of location a right of way existing by prescription, or necessity may be extinguished, or rather the location of such a way may be changed by the oral agreement of *both* parties, and the actual use and substitution of a new way or route in place of the former; and wherever this is done by mutual agreement, and the new location is actually used and adopted in place of the former, the right to travel in the former path is thereby lost, and the right to the new way or route becomes fixed and irrevocable¹ in the owner of the original way.

In *Shelby v. The State*² the public had ceased to use a public highway and adopted another for several years, and the owner of the soil afterwards resumed possession and use of the old road, and inclosed it with his adjoining estate, it was held, in the absence of any contrary proof, that the abandonment of the old road might well be presumed, and the owner was held not liable to indictment for erecting the fence.

But in England it has been held that an oral agreement to substitute a new way for an old one acquired by prescription, followed by a use of the new way for over thirty years, did not warrant a jury in finding that the old way had been aban-

¹ *Pope v. Devereux*, 5 Gray, 409; *Larned v. Larned*, 11 Met. 421; *Smith v. Barnes*, 101 Mass. 278. And see *Smith v. Lee*, 14 Gray, 480.

² 10 Humph. 165. And see *Hutto v. Tindall*, 6 Rich. L. 396. Mere non-user of the whole width of the way might not have the same effect. See *Fox v. Hart*, 11 Ohio, 414; *State v. Alstead*, 18 N. H. 65.

doned ;¹ and Willes, J., was inclined to think that there never could be an abandonment of a prescriptive easement without a deed, or evidence from which a jury could presume a release of it.

No case has yet arisen in which the means of access to a path over which there is a private right of way has been cut off in such a manner as to leave the path inaccessible so as to raise the question of the effect of such a circumstance on the easement. Until recently no such case had arisen with reference to a public right of way ; but in *Bailey v. Jamieson*,^{*} the point came directly before the court for determination, and it is therefore possible, though it is difficult to see by what means, a similar question may arise with reference to a private right of way. There was, in that case, a public footpath leading from one road to another, but these roads were legally stopped by orders of Quarter Sessions, and the question was whether the public right of way over the footpath still remained. It was held that it was destroyed, for that though it had been decided in previous cases that the stoppage of one end of a public road did not destroy the right, yet that when both ends were stopped so that the public could not get access to the way it had lost its character of a highway, and the right must be held to be destroyed. Whether such a point can arise in the case of a private way it is difficult to say, but possibly it might. As, however, one end of a private way is generally, if not always, at the dominant tenement, it is difficult to conceive that that end could be stopped, though the other end might ; as, for instance, if it were at a public highway which was diverted. It is, however, possible that, although the end next the dominant tenement could not get stopped while the dominant tenement continued in existence, yet that a piece of a path might be cut off from the rest, as, for instance, by a landslip or by diversion and stopping up of a public way crossing it or otherwise, and the question would then arise whether the easement re-

Ways becoming inaccessible.

¹ *Lovell v. Smith*, 3 C. B. N. S. 120 (1857). And see *Wright v. Freeman*, 5 H. & J. 475.

^{*} 1 C. P. D. 329.

mained over the part of the path cut off. On the ground that a right of way can only be destroyed if a release can be implied, could a release be implied in such a case? Probably it could, for if a way becomes inaccessible it would most likely be taken to be abandoned as useless, and for the purpose of such abandonment a release would be implied.

APPENDIX.

THE PRESCRIPTION ACT,

2 & 3 WM. IV. c. 71.

An Act for shortening the Time of Prescription in Certain Cases.
[1st August, 1832.]

WHEREAS the expression "Time immemorial, or time whereof the memory of man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our sovereign lord the king, his heirs or successors, or any land being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but neverthe-

Claims to right of common and other profits *à prendre*, not to be defeated after thirty years' enjoyment by showing the commencement:

less such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

after sixty
years' en-
joyment
the right to
be abso-
lute, un-
less had by
consent or
agreement.

II. And be it further enacted, that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any water-course, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the king, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

In claims
of right of
way or
other ease-
ment the
periods to
be twenty
years and
forty
years.

III. And be it further enacted, that when the access and use of light to and for any dwelling-house, workshop, or other buildings shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Claims to
the use of
light en-
joyed for
twenty
years inde-
feasible,
unless
shown to
have been
by consent.

IV. And be it further enacted, that each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may re-

Before
mentioned
periods to
be deemed

late shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

those next before suits for claims to which such periods relate.

V. And be it further enacted, that in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment there of as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

In actions on the case the claimant may allege his right generally, as at present.

In pleas to trespass and other pleadings where party used to allege his claim from time immemorial, the period mentioned in this act may be alleged; and exceptions or other matters to be replied to specially.

VI. And be it further enacted, that in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favor or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act, as may be applicable to the case and to the nature of the claim.

Restricting the presumption to be allowed in support of claims herein provided for.

VII. Provided also, that the time during which any person other-

wise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

VIII. Provided always, and be it further enacted, that when any land or water upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.

IX. And be it further enacted, that this act shall not extend to Scotland or Ireland.

X. And be it further enacted, that this act shall commence and take effect on the first day of Michaelmas term now next ensuing.

XI. And be it further enacted, that this act may be amended, altered, or repealed during this present session of Parliament.

Proviso for infants, &c.

What time to be excluded in computing the term of forty years appointed by this act.

Not to extend to Scotland or Ireland.

Commencement of act.

Act may be amended.

INDEX.

ABANDONMENT.

Extinction of easements by abandonment, 460, 477.

Release must be capable of being implied, 460, 477.

Not implied from non-user alone, 461.

When implied on cessation of user, 462.

Cases in which non-user is the only evidence of abandonment, 464.

In what cases implied after non-user for less than twenty years, 465, 478.

Abandonment can only occur after an easement has actually been acquired, 466.

Temporary agreement to suspend user negatives presumption of abandonment, 467.

So also temporary substitution of a new mode of enjoyment for the sake of convenience, 467, 468.

Right of dominant owners to abandon easements, 468.

ABATEMENT.

Right to abate an obstruction of an easement, 406.

ACQUIESCENCE.

Licenses implied from acquiescence, 91.

Acquiescence, though not sufficient for such implication, sometimes sufficient to prevent a right to interfere with an easement, 91.

Acquiescence in interruption required by the Prescription Act to bar prescription, 178, 179.

Acquiescence in pollution of air and water sometimes prevents remedy, 364, 382.

ACQUISITION.

Easements acquired through an act of man, 86.

Natural rights not so acquired, 86.

Act of creation and acquisition often implied, 86.

In what cases implied, 87.

ACQUISITION — *continued*.

Modes of acquiring easements, 87.

Quære : Whether a grant is not always implied, 87.

Easements the same by whatever mode acquired, 88.

Necessity for a deed for acquisition of easements, 88, 90.

Contract for an easement not under seal, 88, 90.

Licenses, how acquired, 90.

Grant by parol, 90.

Implied from acquiescence, 91.

Implied from surrounding circumstances, 92.

ACQUISITION of Easements by Grant, 92. (See GRANT.)

ACQUISITION by virtue of an Act of Parliament, 128. (See ACT OF PARLIAMENT.)

ACQUISITION under a Devise, 131. (See DEVISE.)

ACQUISITION by Prescription, 131, 132. (See PRESCRIPTION and PRESCRIPTION ACT.)

ACQUISITION under a Custom, 183. (See CUSTOM.)

ACTION.

Breach of contract for an easement, 88, 360.

No right of action for previous trespass after an easement has been acquired by prescription, 145.

Prescriptive user must be next before action, 147-149.

Right of action for disturbance of easements, 354, 355.

Damage requisite to support an action, 355, 397, 416, 422.

Effect of absence of damage if the time for suing is limited, 355, 356.

Damage must be substantial, 355, 356.

Slight damage by many persons, 356.

Disturbance of an easement is an injury to the right, which gives a cause of action, 356.

So also disturbance of a natural right, 357.

When the occupier of a dominant tenement alone can sue, 358.

When a reversioner can sue, 359, 394.

Action for continuing a disturbance, 360, 396, 427.

Injunctions, when granted by the court, 363. (See INJUNCTION.)

See, also, AIR ; LIGHT ; SUPPORT ; USE OF WATER ; POLLUTION OF WATER ; STREAMS ; WAYS.

ACT OF PARLIAMENT.

Easements acquired by virtue of acts of parliament, 87, 128.

ACT OF PARLIAMENT — *continued.*

By the express terms or the apparent intention of the act, 128.

Immediately, or on the happening of an event, 129.

Grant at variance with an act, 109, 278.

Grant partly at variance with an act, 278.

No prescription at variance with an act, 158, 279.

Prescription partly at variance with an act, 279.

See, also, **RAILWAY CLAUSES ACT**, 1845.

ACTUAL DAMAGE.

Necessary for cause of action in certain cases for disturbance of easements, 355.

“ACTUAL” ENJOYMENT.

“Actual” enjoyment required by the Prescription Act, 143.

Actual user for nineteen years and a part only, 143.

Light actually enjoyed though the house uninhabitable, 210.

ADJACENT SUPPORT.

Natural right to adjacent support, 33.

See, also, **SUPPORT**.

AGREEMENT.

Suspension of user by, 178. (See **CONTRACT**.)

AIR.

Rights in connection with the air, 28.

Free passage of air, 28, 31–33, 187, 189.

Right to air is an easement, 33.

Right to obstruct air, 33.

Purity of air, 29.

Right to pollute air, 29, 188.

Limit of right to purity of air, 29, 286.

Pollution by reasonable use, 30.

Pollution by carrying on trade, 30.

Air compared with light and water, 31.

Right to free passage of air subordinate to the right to build, 33, 187.

Opening new windows to admit air, 32, 190.

Right to obstruct air from new windows, 32, 190.

Prescriptive right to an uninterrupted flow of air, 138, 187.

Implied grant of right to pollute air, 188.

Prescriptive right to pollute air, 188.

Quære: Whether the right can be acquired under the Prescription Act, 140.

AIR — *continued.*

Implied grant of right to an uninterrupted flow of air, 190.

Not implied from suffering windows to be opened by a neighbor, 190.

Partition of land and houses, 191.

Sale of house reserving adjoining land, 191.

Sale of land reserving house, 191.

Sale of house and land simultaneously, 192.

Covenant for quiet enjoyment, 202.

Open ground; prescriptive right to flow of air, 216.

Right of action for obstruction, 369.

Free passage of air and light distinguished, 369.

Injunctions, when granted for obstruction of air, 370.

Pollution; right to sue for, 370.

Pollution must be unjustifiable, 371.

Air previously polluted by other means, 372.

Coming to a place where the air is polluted, 372.

Unavoidable pollution by trade, 373.

Result of authorities, 379.

Public nuisance by pollution, 381.

Right of action by reversioner for pollution, 381.

Acquiescence in pollution prevents an injunction, 382.

ALTERATION.

Of easements must be material, 453.

Of place of access to a way, 320.

Trifling alteration, 455.

ALTERATION OF DOMINANT TENEMENTS.

Easements cannot be increased by alteration, 280.

Opening new and increasing ancient windows, 32, 290. (See
LIGHT.)

Improving condition of windows to obtain more light, 291.

Right to divert part of a stream; alteration of mill, 307.

Alteration of place of access to a way, 320.

Easements frequently lost by alteration, 452.

Alteration must be material, 452.

Trifling alteration has no effect, 455.

APPARENT EASEMENTS.

Implied grant on partition of an estate, 115.

APPROPRIATION OF WATER.

No right to underground water acquired by appropriating it in
a well, 64, 252.

APPROPRIATION OF WATER — *continued.*

Acquisition of easements in flowing water by appropriation, 251.

Effect of appropriation on right to sue for disturbance of natural rights, 252.

Appropriation of water in a well, 252.

Appropriation of the water of artificial streams; right to sue for pollution, 254, 439.

APPURTENANCES.

What easements will pass to a purchaser as appurtenances, 98, 283.

Quasi-easements used by a vendor during unity of ownership do not pass, 98.

Exceptional cases, 102.

ARTIFICIAL STREAMS.

Defined and distinguished from natural streams, 48.

Temporary and permanent, 243.

See, also, **STREAMS.**

"AS OF RIGHT."

To raise a presumption of lost grant user must have been "as of right," 113.

For prescription user must have been "as of right," 169.

Except in the case of light, 213.

Prescription Act: "as of right;" "claiming right thereto," 169.

User by permission or by stealth not "as of right," 172.

Nor unless peaceably enjoyed, 172.

Interruptions evidence against peaceable enjoyment, 173.

Interruption in enjoyment "as of right" defeats prescription, 174.

ASSIGNMENT, 283.

See **TRANSFER OF EASEMENTS.**

ATTEMPTS to create new species of easements, 77.**BREACH** of contract for an easement not under seal, 90, 360, 361.**BUILDINGS.**

Effect of building on natural right to support for land, 38.

No natural right to support for buildings, 41.

Right to support from land may be acquired, 41, 227.

Effect of contiguity of buildings, 43.

Obligation to usecare when removing one of two adjoining buildings, 43.

No obligation to shore, or give notice of removal, 43, 44.

BUILDINGS — *continued.*

Acquisition of right to support for buildings, 227.

Right to support from land and adjoining buildings by implied grant, 227.

Right to support from land by prescription, 229.

Effect of excavation under buildings, 229, 230.

No right to support from buildings by prescription, 236.

Limited right to support, 294.

Natural right to support for land; effect of erecting buildings, 38, 409.

Right to sue for disturbance of an acquired right to support for buildings, 413.

Effect of increasing the weight of the buildings, 414.

CHANGE OF LOCATION of ways, 320, 490.

CHIMNEY.

Right to use another person's chimney an easement, 78 (*u*).

"CLAIMING RIGHT THERETO."

Prescription Act: "as of right;" "claiming right thereto," 169.

See, also, "AS OF RIGHT."

CLOTHES LINES.

Right to fasten, and dry linen, an easement, 78 (*u*).

COMING TO A PLACE where air is polluted, 372.

COMPLETION of the purpose of a grant, 451.

CONSTRUCTION.

Grant of inconsistent easements, 24,

Sale of land and "appurtenances," 98.

Sale of land with easements "used and enjoyed," 103.

The word "grant" not essential in a deed of grant, 108.

Easements excepted or reserved on sale of land, 108.

Grant at variance, or partly at variance, with an act of parliament, 109, 278.

Grant to become void conditionally, 109.

Grants construed most strongly against the grantor, 277.

CONTINUOUS EASEMENTS.

Implied grant on partition of an estate, 115.

CONTINUOUS ENJOYMENT.

Prescriptive user must be continuous, 174.

Need not be incessant, 174.

Exclusion from computation of periods of disability no breach of continuity, 153.

An interruption and a breach of continuity distinguished, 175.

CONTRACT.

Contract for an easement not under seal, valid, 90, 360.

See, also, **LICENSES** ; **COVENANT**.

COPYHOLD.

Grant by copyholder of right to deprive land of necessary support, void, 225.

COVENANT.

For rights not recognized as easements, 22, 78.

Covenants by landowners, 89.

Agreement under seal for use of a way, not merely a covenant for quiet enjoyment, 96 (*v*).

Effect of covenant for quiet enjoyment, 202.

Effect of this covenant on grants of easements by general words, 399.

See, also, **LICENSES**.

CUSTOM.

Custom distinguished from easements, 18.

Easements acquired by virtue of customs, 19, 87, 184.

Acquisition under the Prescription Act, 21, 185.

Claims both by prescription and under a custom, 185.

Customs must be reasonable and certain, 185.

Obstruction of ancient light under custom of London, 210.

Custom to deprive land of necessary support when mining, unreasonable, 224.

CUTTING ICE, 298, 299.

Cummings v. Barrett, 298.

DAMAGE.

Actual damage requisite to support an action, 355.

Effect of absence of damage if the time for suing is limited, 355.

Damage must be substantial, 356.

Slight damage by many persons, 356.

Disturbance of an easement an injury to the right which gives a cause of action, 356.

So, also, disturbance of natural right, 357.

DAMAGES.

In what cases awarded formerly by the court of chancery, 365.

In America, 366-368.

DECREASING the width of private ways, 332.

The American rule, 333-337.

DEDICATION, OR PUBLIC PRESCRIPTION.

Private rights of way not created by dedication, 262.

The public take by dedication, 263.

The public may acquire rights in or over the lands of individuals, 180.

The public acquire these "by dedication," 181.

The doctrine, though modern, is well established, 181.

The power of the owner to interfere with the right of the public is gone, 181.

The owner does not ordinarily lose the fee, 181.

The dedication need not be formal or in writing, 182.

Any acts plainly showing an intention are sufficient, 182.

The public not liable until the right is accepted, 182.

No particular length of time is essential, 183.

Statutes exist in some states, 183.

DEED.

Easements can only be granted or transferred, by deed, 3, 88, 283.

Deeds alone formerly called *writings*, 3 (*d*).

Contract for an easement, not under seal, valid, 90, 360.

Licenses granted by deed, 90.

DEROGATION FROM GRANT.

Derogation from grant, by preventing user of an easement, 94.

DEVIATE, RIGHT TO, for want of repairing easement, 342.

The American rule, 343.

Grounds of the rule, 343.

DEVISE.

Easement acquired under a devise, 87, 131.

Construction of wills, 131.

DIRECTION of ways of necessity, 348.

Variation of direction of ways of necessity, 350.

The law in America, 350, 351.

DISABILITY.

See INCAPACITY.

DISTRIBUTION OF EASEMENTS.

Partition of riparian land; distribution of riparian rights, 53, 310.

Partition of dominant tenements; distribution of easements, 337.

DISTURBANCE OF EASEMENTS.

Primâ facie right to be free from disturbance, 354.

DISTURBANCE OF EASEMENTS—*continued.*

Actions for disturbance, 354–360. (See ACTION.)

Breach of contract for an easement, 360.

Excessive user, when a justification for disturbance, 361.

See, also, AIR; LIGHT; STREAMS; SUPPORT; POLLUTION OF WATER: USE OF WATER; WAYS.

DIVERSION OF STREAMS.

Natural right to the uninterrupted flow of streams, 56.

Right to divert may be acquired, 56, 249.

Natural right to divert for use, 58.

Obligation to return diverted water to the stream, 58.

Right to divert flood water, 58.

Right to divert the flow of the sea for protection of land, 58.

Right to divert tidal rivers for protection of land, 60.

Right to divert part of a stream, 302.

See, also, STREAMS.

DOMINANT OWNER.

Who is, 11.

Incapacity of dominant owner to take by grant rebuts prescription, 163.

DOMINANT TENEMENT.

What is, 11.

Essential for the existence of easement, 8.

Must be distinct property from the servient tenement, 11.

Easements between landlord and tenant, 13, 14.

Between tenants of same landlord, 13.

Easements cannot be severed from dominant tenements, 9.

Not universally true in America, 10.

Easements must be beneficial to them, 14.

Easements can only be used in connection with them, 321.

Effect on easements of partition of their dominant tenements, 337.

The American law, 339.

DRAINAGE OF LAND.

Destruction of support by drainage, 41, 226.

Right to drain away surface and underground water, 55, 243.

DRAINS.

Pollution of streams by public sewers, 436.

EASEMENT.

Misuse of the word "Easement," 1.

EASEMENT — *continued.*

Definition, 2.

Various definitions of, 2.

Distinguished from natural rights, 2, 88.

Distinguished from licenses, 3, 4. (See LICENSES.)

Modes of creation and acquisition of easements, 87.

Can only be granted by deed, 3, 88.

Assignment of easements, 283. (See TRANSFER.)

Is a *privilege* only, not an interest in land, 4.

Same is true in the case of public ways, 5.

Exclusive use of land not an easement, 5.

Without profit, 6, 7.

Easements *in gross* unknown to the law, 7.

Not universally true in America, 10.

Cannot be severed from its dominant tenement, 10, 321.

Dominant and servient tenements must be distinct, 11.

Prescriptive rights between landlord and tenant impossible, 12.

Easements by grant of landlord possible, 14.

Prescriptive rights between tenants of same landlord possible, 13.

Must be beneficial to its dominant tenement, 14.

No easement for the benefit of the servient tenement, 16.

Nature of the obligation on the servient owner, 17.

Distinguished from customs, 18.

May be acquired by virtue of customs, 19, 184.

New species of easements not recognized by law, 21, 77.

Remedy only for breach of covenant, 22, 23.

Effect of easements on natural rights, 23.

Frequently adverse to natural rights, 23.

Inconsistent easements, 24, 280.

Cannot coexist, 24.

Release presumed from inconsistent user, 25.

Subordinate easements, 25.

Easements of necessity, 25. (See NECESSITY, EASEMENTS OF.)

No hindrance to consistent use of land, 280.

Meaning of "Easement" in Prescription Act, 138.

Uninterrupted flow of air, 138.

Support, 140.

Pollution of air, 140.

Acquisition of easements, 87. (See ACQUISITION.)

EASEMENT — *continued.*

Easements and their incidents the same by whatever mode acquired, 87.

Distribution on partition of dominant tenements, 337.

See, also, the respective titles throughout the Index.

EASEMENTS OF NECESSITY, 25.

See NECESSITY, EASEMENTS OF.

EAVES, drip of, 251.

ENLARGING the size or increasing the number of windows, 290.

ESTOPPEL.

Estoppel from denying an easement, 95.

Same rule of law prevails in America, 95.

EXCAVATION.

Excavation of subsoil ; effect on natural right to adjacent support, 38.

Excavation under houses, 38.

Easement of support for excavated land, 43.

Right to let down surface land by excavating, 44.

See, also, MINES ; SUPPORT.

EXCEPTION.

Operation of an exception of an easement on sale of land, 108.

EXCESSIVE USER.

See MODE OF USER.

EXTENT OF EASEMENTS.

Natural rights limited by each other, 274.

Abridged and suspended by easements, 275.

Measure of easements created by deed, 275.

Surrounding circumstances to be considered, 276, 277.

Grants construed most strongly against the grantor, 277.

Measure of easements acquired by prescription, 276, 316.

Surrounding circumstances to be considered with user, 277.

Grant partly at variance with an act of parliament, 278.

Prescription partly at variance with an act of parliament, 279.

Easements do not prevent the consistent use of land, 280.

Increase of easements by alteration of dominant tenements, 280.

Right to prevent excessive user, 281, 309.

Assignment of easements, 283.

Natural rights always pass with land, 283.

Easements can only be transferred by deed, 283.

Severance of easements from their dominant tenements, 10, 321.

EXTENT OF EASEMENTS — *continued.*

The rule in America, 10, 321.

Assignment of riparian rights apart from their dominant tenements, 310.

Distribution of riparian rights on partition of riparian land, 310.

Distribution of easements on partition of their dominant tenements, 337.

Extent of a right of way, 328.

See *MODE OF USER, and the respective titles throughout the Index.*

EXTINCTION.

On acquisition of an inconsistent easement, 24.

Natural rights cannot be extinguished but may be suspended, 448.

Easements may be extinguished or suspended, 448.

Revive after suspension but not after extinction, 448, 475.

Modes by which easements may be extinguished, 449.

1. By act of parliament, 450.

2. By operation of law, 451.

Completion of the purpose of a grant, 451.

Easements of necessity extinguished on termination of the necessity, 452.

Alteration of the dominant tenement, 452.

Extinction only if alteration is material, 453.

Not if trifling, 455.

Unity of seisin, 457.

Necessity for unity of *seisin*, 457.

And for estates in fee simple, 459.

Unity of possession and enjoyment not material, 460.

3. By the act of the dominant owner, 460.

Release and abandonment, 460, 477.

Non-user alone not conclusive evidence of abandonment, 461.

When abandonment is presumed on cessation of user, 462.

Cases in which non-user is the only evidence of a release, 462.

Abandonment presumed sometimes after non-user for less than twenty years, 465.

Release or abandonment when possible, 466.

EXTINCTION — *continued*.

Temporary agreement to suspend user, 467.

Substitution of a new method of enjoyment for convenience, 467.

FEME COVERT.

Exclusion of periods during marriage when computing prescriptive periods, 152.

FISH.

Right to take fish, a *profit à prendre*, 7.

FLOODS.

Right to protect land from floods, 59.

Questionable whether there is liability for injury to neighbors, 59 (*s*).

Right to protect land from the sea, 59.

Injury to a neighbor justifiable, 59.

Obligation to keep up sea walls, 59.

Injury to neighbors not justifiable in the case of tidal rivers, 60.

Right to pour water on another's land, 61, 249.

Obligation to continue pouring such water, 61, 249.

FLOW OF AIR.

See AIR.

FLOW OF LIGHT.

See LIGHT.

FLOW OF STREAMS.

See STREAMS.

The law in America, 303.

FORFEITURE.

Easements void and voidable, 109.

GATES AND BARS on private ways, 330, 331.

GENERAL WORDS.

General words in a deed of conveyance, 97.

The American rule is the same, 99.

Effect on existing easements and *quasi*-easements used by a vendor during unity of ownership, 97.

"Appurtenances," what will pass by grant of, 100.

What will not pass, 100.

Quasi-easements will not pass as "appurtenances," 101.

Exceptional cases, 102.

GENERAL WORDS — *continued.*

When *quasi*-easements will pass under general words, 103.

The American law, 120.

Grant of easements "used and enjoyed," 103.

Four distinct classes in America, 120, 121, 122, 124.

Easements first used and enjoyed during unity of ownership, 103.

Modification of rule, 104.

Result of authorities, 107.

GRANT.

Grant at variance with an existing easement, 24.

Grant at variance with an act of parliament, 109, 278.

Grant of riparian rights by a riparian proprietor, 53, 310.

Grant at variance with natural rights, 57.

When a grant can be implied, 87.

Acquisition by grant, 87, 92.

Quære: whether the only mode of acquiring easements, 87.

Grant of licenses, 90. (See LICENSES.)

Grant by one tenant to another, 93.⁶

Derogation from grant by preventing user of an easement, 94.

Estoppel from denying a grant of an easement, 95.

Grant for a limited period, 96.

Acquisition by express grant, 96.

Distinction on sale of land, between easements in another's soil and similar usages in the vendor's, 97.

By particular description, 97.

By general words, 97-106. (See GENERAL WORDS.)

The word "grant" not essential in a deed, 108.

Exception or reservation of an easement on sale of land, 108.

Conditional grant, 109.

Grant of way subject to a right of ploughing, 314 (c).

Acquisition by implied grant, 109, 168.

No prescription at variance with a grant, 155.

Prescription possible only when grant can be presumed, 157.

Easements necessary to render a grant beneficial, 109, 275.

Grant implied from surrounding circumstances, 111.

Presumption of lost grant after twenty years' user, 111, 132.

GRANT — *continued.*

User must have been as of right, 113. (See "As of RIGHT.")

Ignorance of and incapability of resisting user, 113.

Grant not presumed solely from lapse of time, 114.

Surrounding circumstances to be considered, 114.

User by leave, or right contested, 115.

No prescription adversely to a statute, 159.

Apparent and continuous easements; implied grant on partition of an estate, 115.

Result of the authorities, 119.

Implication of grant essential to a prescriptive title, 132.

(See **PRESCRIPTION**.)

Except in cases of rights to light, 211.

Quære: Whether implied in cases of right to support, 230-238.

Construction most strongly against grantor, 277.

GROSS, RIGHTS IN.

Not easements, 7.

Easements cannot be severed from their dominant tenements, 10, 321.

Not universally true in America, 10.

HIGHWAY, right of way to, 328.**IDIOTS.**

Exclusion of periods during idiotcy when computing prescriptive periods, 152.

IGNORANCE.

Ignorance of user by servient owner prevents presumption of lost grant, 113.

And prescription, 165.

IMMEMORIAL USER.

Meaning of, 132.

IMPLICATION OF GRANT.

Licenses implied from acquiescence, 91.

From surrounding circumstances, 92.

In what cases grants of easements can be implied, 109-127.

See, also, **GRANT**; **PRESUMPTION**; **PRESSCRIPTION**.

IN GROSS, easements, unknown to the law, 7.

Not universally true in America, 10.

INACCESSIBLE, ways becoming, 491.

INCAPACITY.

Incapacity of servient owner to resist user prevents presumption of lost grant, 113. (See GRANT.)

Prescription Act; exclusion from prescriptive periods of periods of incapacity, 154. (See PRESCRIPTION ACT.)

Incapacity of servient owner to resist user prevents prescription, 160. (See PRESCRIPTION.)

Character of the power of resistance, 161.

Quære: In cases of right to light, 215.

Incapacity of servient owner to make a grant prevents prescription, 162.

Incapacity of dominant owner to take a grant prevents prescription, 163.

The law in America is the same, 165.

INCONSISTENT EASEMENTS.

See EASEMENT.

INCORPOREAL RIGHT.

Easements are incorporeal rights, 4.

Confer no interest in the soil, 4.

Right to take coal, and right to take *all* coal distinguished, 5.

Grant of the exclusive use of land, 5.

INCREASE OF EASEMENTS.

Alteration of dominant tenements, 280.

Opening new and increasing ancient windows, 32, 190, 290.

Improving the condition of ancient windows, 291.

Mill requiring more water in consequence of alteration, 308.

INFANCY.

Infancy rebuts presumption of a grant, 113.

Exclusion of periods during infancy when computing prescriptive periods, 152.

INJUNCTION.

In what cases granted by the court, 363.

Injunctions in America, 366-368.

Granted at the suit of a person with limited interest, 397.

When a possibility of future injury only, 401.

Pollution of water restrained, 437.

Riparian owners must prove injury in that character, 439.

See the respective titles throughout the Index.

INTERMITTENT STREAMS.

What are, 53.

Natural rights and easements therein, 53.

INTERRUPTIONS.

Interruptions in user evidence of enjoyment not being *as of right*, 173.

Prescriptive user must be uninterrupted, 174.

Interruption in enjoyment *as of right*, 175.

Interruption in enjoyment *as an easement*, 176.

Interruption in enjoyment *in fact*, 177.

Interruption in fact as at common law, 177.

Non-user, 177.

Partial interruption of user, 177.

Trifling and accidental interruptions, 178.

Suspension of user by agreement or for convenience, 178.

Interruption in fact under the Prescription Act, 178.

Obstruction must be submitted to or acquiesced in for one year after notice, 178.

Actual and involuntary discontinuance of enjoyment required, 179.

Obstruction by a stranger, 179.

Submission and acquiescence, 180.

Interruption by tenant for life, 180.

IRRIGATION OF LAND.

Riparian right to use water of streams for irrigating riparian land, 300.

IRRIGATION in America, 301.

Must be reasonable, 301.

LAND.

Right to send water over, 61.

LANDLORD AND TENANT.

Landlord cannot acquire easement against while estate is in possession of tenant, 114.

User of easements by tenant in landlord's ground, 12, 173.

Prescriptive rights between tenants, 13.

Grant by landlord to tenant, 14.

Prescription against a landlord out of possession, 160, 161.

LANDS CLAUSES ACT, 1845.

See RAILWAY CLAUSES ACT, 1845.

LICENSES.

Distinguished from easements, 3, 4.

Effect of a license, 4.

How conferred, 90.

By word of mouth, 90.

By writing, 90.

By deed, 90.

Implied from acquiescence, 91.

Implied from circumstances, 92.

Revocable and irrevocable, 469.

Connected with a grant irrevocable, 469.

Execution of a work of a permanent and expensive character, 471.

The American law, 472.

Revocation by adverse act of the grantor, 474.

See, also, PERMISSION.

LIFE ESTATES.

Exclusion of periods during life estates when computing prescriptive periods, 152, 153.

LIGHT.

Compared with air and water, 31.

Natural right to use of light, 31.

Right to light is an easement, 33.

Right to free passage of light, 31-33.

Subordinate to the right of a neighbor to build, 32, 189.

Opening new, and increasing ancient windows to admit light, 32, 190, 290.

No justification for obstructing ancient lights, 387.

Right to obstruct new windows, 32, 290.

Right to light acquired by improving the condition of windows, 291.

Prescription Act (section 3), as to light, 138, 142.

Light not claimable by prescription at common law, 144, 210.

Acquisition by grant, 188.

No grant implied from suffering new windows to be made, 190.

Implied grant on partition of land and houses, 191.

Sale of house, reserving adjoining land, 191, 384.

Sale of land, reserving house, 191.

Sale of house and land simultaneously, 192.

LIGHT — *continued.*

Effect of covenant for quiet enjoyment, 202.

Effect of this covenant on a grant by general words,
399.

Acquisition by prescription, 190, 192.

In America there is no prescriptive right to light and air, 202–
210.

Unless Delaware be an exception, 210.

House uninhabitable; *actual enjoyment* required by statute, 210.

Customary right to build so as to obstruct abolished, 210.

Prescriptive right depends solely on the statute, 211.

No grant or license presumed, 212.

Doubts on these points, 212.

Light need not be enjoyed “as of right,” 213.

Capability of resisting enjoyment, 215.

Enjoyment in the character of an easement, 215.

Open ground; no prescriptive right to light, 216.

Shop windows; light for display of goods, 216.

Extraordinary light for special purpose, 217, 289, 290.

Increasing and altering light by reflection, 219.

Extent of the right to light, 286.

1. When acquired by prescription, 286.

2. When acquired by grant, 289.

The purpose for which light is used not to be regarded, 289.

Free passage of air and light distinguished, 369.

Injunctions, when granted for obstruction of air, 370.

Obstruction of light, 382.

Right to sue, 382.

Restraint by injunction, 383.

Acquiescence in building, effect of, 384.

Right by implied grant; obstruction, 384.

That sufficient light is left, no justification for obstruction,
385, 386.

Neither that a new stream of light is substituted, 386.

Position of an obstructing building, 387.

That ancient lights have been enlarged or new windows
opened, no justification for obstruction, 387.

Right of action by reversioner, 394.

Injunction at the suit of a person with limited interest,
396.

LIGHT — *continued.*

Right to sue a tenant for obstructing light, 397.

Cannot be sued for continuing obstruction, 397.

Substantial injury requisite to support an action, 397.

Breach of covenant for quiet enjoyment, 399.

Light prevented falling at an angle of forty-five degrees, 400.

Possibility of future injury, 401.

Right to abate an obstruction of light, 406.

Loss of right by abandonment, 477. (See **ABANDONMENT**.)

Presumption of release of servient owner's obligation, 478.

Release presumed after less than twenty years' non-user, 478.

Effect of altering the size or position of ancient windows, 480.

Effect on rights acquired by grant, 480.

Effect on rights acquired by prescription, 481.

Non-user, 482.

Restoration of ancient lights in new buildings, 483.

LIMIT OF EASEMENTS, 274.

See **EXTENT OF EASEMENTS**.

LIMITED SUPPORT for buildings, 294.**LOCUS AD QUEM**.

User of way to a place beyond, 324.

The American doctrine, 325, 326.

MANUFACTURES.

Natural right to use water of streams for manufacturing purposes, 302.

MARRIAGE.

See **FEME COVERT**.

MEASURE.

Of easements granted by deed, 275.

Of easements acquired by prescription, 279.

Of right of way granted by deed, 314.

The law in America, 315, 316.

MINE.

Right of necessity to dig through surface land, 26.

Natural right to support afforded by minerals, 34.

Right to excavate minerals and substitute props, 36, 416.

Result if destruction of support is inevitable when working mines, 37, 294.

MINE — *continued*.

- Support afforded by water in a mine ; right to drain, 39.
- Right to let down surface land when excavating minerals, 44.
- Mining leases ; right of lessee to destroy all support, 223.
- Reservation of mines with power to excavate the minerals, 294.
- Right to excavate under railways when land is purchased compulsorily, 38, 225, 421.

See **SUPPORT**.

MISCELLANEOUS RIGHTS.

- Public highway, 8.
- Pews, 8 (*s*).
- Common, 8 (*s*).
- Fastening clothes lines and drying linen, 78 (*u*).
- Nailing trees to a wall, 78 (*u*).
- Use of a chimney for smoke, 78 (*u*).
- Dripping of eaves, 78 (*u*).
- Public-house sign-post, 78 (*u*).
- Tethering horses, 78 (*u*).
- Maintaining a sign-board, 78 (*u*).
- Uninterrupted prospect, 77.
- Uninterrupted view of shop windows, 82.
- Undisturbed privacy, 84, 85.

MODE OF USER.

- How ascertained, 275.
 - If an easement is granted by deed, 275, 314.
 - If acquired by prescription, 279, 316.
- Increase of user by alteration of the dominant tenement, 280.
- Excessive user, 281, 309.
 - Right to obstruct excess, 281, 309.
 - Enlarging and increasing the number of ancient windows, 290, 387.
 - Improving the condition of ancient windows, 291.
- Use of water of natural streams, 296.
 - Limited by right to uninterrupted flow, 296.
 - Right to use to be exercised reasonably, 296.
 - Supplying a gaol or lunatic asylum, 296.
 - Ordinary and extraordinary use, 297.
 - Use for purposes of utility only, 300.
 - Irrigation of riparian land, 300.
 - Use for manufacturing purposes, 302.
- Pollution of water by particular means only, 309.

MODE OF USER — *continued.*

Pouring dirty water in excess of right, 309.

Easements only to be used in connection with their dominant tenements, 321, 324.

Not universally true in America, 10, 321.

Use of way to *locus ad quem* and thence beyond, unlawful, 324.

Mere colorable use of dominant tenement, 325.

Way leading to a highway, 328.

Decreasing the width of ways, 332.

Way impassable ; right to walk on adjoining land, 340.

Way periodically interrupted ; right to deviate, 340.

Interruptions from extraordinary causes ; right to deviate, 341.

Destruction of road ; right to deviate, 341.

Want of repair ; right to deviate, 342.

The American law, 343.

Way impassable by act of grantor ; right to deviate, 345.

Repair of ways, 346.

Direction of ways, 346.

Direction of ways of necessity, 348.

Variation of direction of such ways, 350.

The law in America, 350.

Variation of mode of using ways, 350, 351.

Right to apply modern inventions, 351.

Power to make ways to be exercised reasonably, 352.

See, also, **EXTENT OF EASEMENTS.**

NAILING TREES.

Right to nail trees to a wall, 78 (*u*).

NATURAL RIGHTS.

What are, 2.

Easements distinguished from, 2, 3.

Given by law and inherent in land, 2.

How affected by easements, 23, 157, 275.

Natural rights apparently inconsistent, 24, 274.

Natural rights in streams, called "Riparian Rights," 52. (See **RIPARIAN RIGHTS.**)

No natural rights of way, 72.

Cannot be extinguished, 448.

May be suspended, 448.

NATURAL RIGHTS — *continued.*

After suspension will revive, 448.

See, also, AIR ; LIGHT ; SUPPORT ; STREAMS ; WATER.

NATURAL STREAMS.

Defined and distinguished from artificial streams, 48.

See, also, STREAMS.

NECESSITY, EASEMENTS OF.

Their nature, 25.

The *American* law is in harmony with the *English*, 269, 270, 271.

Whether there must be an absolute necessity, 26, 268.

When such easements are permitted, 26.

Pass to a purchaser of land under general words of conveyance, 98.

Acquisition of ways of necessity, 266.

No other way must exist, 268.

Grant must be capable of being presumed, 268.

Coextensive with the necessity, 319.

Direction of ways of necessity, 348.

Variation of direction of ways of necessity, 350.

The law in America, 350, 351.

Extinguished when the necessity ceases, 452, 486.

Extinction on union of seisin, 488.

The American law, 487, 488, 489.

Revival on severance, 488.

In many American States there are statutes, 272, 273.

NEGLECT to repair a way, no action for, 443.

NEGLIGENCE.

Removal of one of two adjoining buildings, 44.

Obligation to use care, 44.

No obligation to shore or give notice of removal, 44.

NEW SPECIES OF EASEMENT.

Not recognized by law, 21, 77.

Covenant for such rights binding on covenantor, 22, 78.

"NEXT BEFORE" SUIT OR ACTION.

Prescription Act ; prescriptive periods required to be next before some suit or action, 146.

Not from the commission of an adverse act, 147.

Meaning of *some* suit or action, 147.

User must be *next* before suit or action, 148.

No such rule at common law, 149.

Intervening periods of disability to be excluded when computing prescriptive periods, 152.

NOISE.

Acquisition of prescriptive right, 141 (*d*).

NON COMPOS MENTIS.

Exclusion of periods of lunacy when computing prescriptive periods, 152.

NON-USER.

Acquisition of easements prevented by non-user, 177.

Suspension of user by agreement, or for the sake of convenience, 178.

Non-user alone not conclusive evidence of abandonment, 461.

When non-user raises a presumption of abandonment, 462.

Cases in which non-user is the only evidence of abandonment, 464.

Abandonment presumed after non-user for less than twenty years, 465.

Non-user in consequence of a temporary agreement, 467.

Non-user on substitution of new method of enjoyment for convenience, 467.

NUISANCES, public, 381.

OBLIGATION.

Nature of on servient owner, 17.

And right to repair a supporting building, 294, 295.

To keep a stream free from obstruction, 427.

The American law, 428.

OBSTRUCTION.

See AIR ; LIGHT ; PROSPECT ; STREAMS ; WINDOW.

By grantor, right to deviate, 345.

OWNERSHIP, UNITY OF.

See UNITY OF OWNERSHIP.

PAROL.

Licenses granted by parol, 3, 90.

Easements can only be granted or transferred by deed, 3, 88, 283.

Contract for an easement not under seal, valid, 90.

PARTIAL INTERRUPTION of user, 177.

PARTITION OF LAND.

Partition of riparian estate ; effect on riparian rights, 53, 437.

No implied grant of *quasi*-easements used during unity of seisin under the word "appurtenances," 100.

Exceptional cases, 102.

PARTITION OF LAND — *continued*.

Grant of easements "used and enjoyed" during unity of seisin, 103.

Implied grant of apparent and continuous easements, 105.

Distribution of easements on partition of dominant tenements, 337.

PARTY WALLS, 228, 229.**PASTURAGE**.

Right of pasturage, a *profit à prendre*, 7.

PEACEABLE ENJOYMENT.

Prescriptive user must be peaceable, 172.

Interruptions, however slight, are evidence that enjoyment is not peaceable, 173.

PENNING BACK WATER.

Right to pen back the water of streams an easement, 58, 249.

Acquisition of such right by prescription, 249.

See also **STREAMS**.

PERMANENCE.

Tenements and the subjects of easements must be permanent for prescription, 166.

PERMISSION.

Permission for user prevents prescription, 172.

Cessation of user by permission, 179.

Exception, 173.

PEW.

Right to a, in a church, is designated an easement, 8, 79.

PLANS.

Ways shown in plans of property conveyed; grant, 264.

The American doctrine, 265.

POLLUTION OF AIR.

Natural right to purity of air, 29.

Limit of that right, 29, 286.

Right to pollute air an easement, 29, 188.

Pollution in the absence of an easement, when justifiable, 30.

By reasonable use, 30.

By carrying on trade, 30.

Implied grant of right to pollute on sale of a factory, 188.

Acquisition of right by prescription, 188.

Quære: whether the right can be acquired under the Prescription Act, 141.

Right of action for pollution, 370.

POLLUTION OF AIR — *continued.*

Pollution must be unjustifiable, 371

Air previously polluted by other means, 372.

Coming to a place where the air is polluted, 372.

Unavoidable pollution by trade, 373.

Result of authorities, 379.

Public nuisance, 381.

Right of action by a reversioner, 381.

Acquiescence in pollution prevents an injunction, 382.

POLLUTION OF WATER.

Natural right to purity of water, 67, 253.

No distinction between surface and underground water, or defined and undefined streams, 66, 253.

Right to pollute water an easement, 68.

An easement within the meaning of the Prescription Act, 142.

Right by appropriation to purity of artificial streams, 254.

Acquisition of right to pollute streams, 258.

Pollution imperceptible and gradually increasing, 258.

Measure of prescriptive right to pollute streams, 307.

Measure if pollution has gradually increased, 307.

Pollution by a particular means, 309.

Right to sue for pollution, 434.

Pollution by others no justification for fouling water, 435.

Pollution of water by carrying on trade not justifiable, 436.

When the court will restrain pollution, 436.

Acquiescence prevents such remedy, 364.

Drainage of towns restrained if streams are polluted, 437.

The American law, 438.

Riparian owners must prove injury in that character, 438.

Right to sue for pollution of underground water, 439.

Right to sue for pollution in the absence of right to use water, 439.

POSSIBILITY.

Of future injury to light, 401.

The American law considered, 407, 408.

POURING WATER OVER LAND.

Right to send water over land may be acquired as an easement, 61, 250.

No obligation to continue sending such water, 61, 251.

POURING WATER OVER LAND — *continued.*

A right to a watercourse within the Prescription Act, 142.

Right to send clear water ; sending dirty water in excess of right, 309.

PRECARIOUS ENJOYMENT.

Insufficient for prescription, 172.

PRESCRIPTION.

Acquisition of easements, by prescription, 87, 131.

Prescription in America depends mostly upon common law principles and not upon special statutes as in England, 133.

Must be adverse, 134.

In America there is no prescriptive right to light and air, 202–210.

Mahan v. Brown the great leading case, 203.

Unless Delaware be an exception, 210.

In some States there are short Prescription Acts, 220.

Cannot be so acquired for a limited period, 96, 146.

Nature of prescription at common law, 132.

Meaning of “immemorial usage,” or “time whereof the memory of man runneth not to the contrary,” 132.

Presumption of immemorial usage after twenty years’ user, 132.

Presumption of grant, 133.

Prescription under the Prescription Act. (See **PRESCRIPTION ACT.**)

Common law not affected by the act, 144.

Except in cases of right to light, 144, 211.

And (*quære*) in cases of claims to other absolute and indefeasible rights, 144.

Owners in fee can alone prescribe at common law, 145.

Claims in right of occupiers under the act, 145.

All prescriptive rights acquired for the owner in fee, 146.

Prescriptive user the same in character at common law and under the act, 154.

No prescription at variance with a grant, 155.

No prescription at variance with a prescriptive right, 156.

An easement may be acquired subordinate to an adverse right, 25, 157.

Prescription may be at variance with natural rights, 157.

No prescription unless a grant can be presumed, 133, 157.

Except in cases of right to light, 158, 211.

PRESCRIPTION — *continued.*

Easements must have been capable of being granted, 158.
Owner being totally deprived of the use of his land, immaterial, 158.

No prescription adversely to a statute, 159, 279.

Prescription subsequent to an adverse statute, 160.

Servient owner must have been capable of resisting the user, 160.

Quære : In cases of right to light, 215.

User in land occupied by a tenant, 160, 161.

User in land not the property of the servient owner, 161.

The power to resist must be by some reasonable means, 161.

Servient owner must have been capable of granting the right claimed, 162.

Dominant owner must have been capable of taking the right claimed by grant, 163.

Time when incapacity must exist to defeat prescription, 164.

No prescription if servient owner is ignorant of the user, 165.

Knowledge may be presumed in some cases, 166.

Dominant and servient tenements, and the subject of an easement, must be permanent, 166.

No prescription unless title is acquired against all persons, 167.

User must have been "as of right," 113.

Except in the case of light, 213.

User by permission, or by stealth, or precarious, not "as of right," 172.

Nor unless peaceably enjoyed, 172.

All interruptions are evidence that enjoyment is not peaceable, 173.

Privilege must have been enjoyed in the character of an easement, 173, 215.

User must be uninterrupted and continuous, 174.

Interruptions are of three kinds, 175.

Interruptions in enjoyment *as of right*, 175.

Interruptions in enjoyment *as an easement*, 176.

Interruptions in enjoyment *in fact*, 177.

Interruptions in fact at common law, 177. (See INTERRUPTIONS.)

PRESCRIPTION — *continued.*

Interruptions in fact under the Prescription Act, 178.

(See **INTERRUPTIONS.**)

Easements not claimable both by prescription and under a custom, 184.

See, also, **PRESCRIPTION ACT.**

PRESCRIPTION ACT. (For the Act, see **APPENDIX**, p. 493.)

Acquisition of easements by custom recognized, 18. (See **CUSTOM.**)

Origin of the Act, 111, 136.

Preamble, 136.

Section 1 relates to *profits à prendre*, 137.

Section 2. — Ways or other easements, watercourses, or the use of water, 137.

Section 3. — Light, 137, 142. (See **LIGHT.**)

To what easements the act applies, 131.

Easements acquired by custom, 138.

Private (not public) ways, 138.

“Or other easement,” 138.

Uninterrupted flow of air, 138.

Support, 140.

Pollution of air, 140.

Must be for a purpose contemplated by the act, 141, 142.

Easement claimed to obtain a *profit à prendre*, 142.

“Watercourse :” meaning of the word, 142.

Right to pour water over land, 142.

Right to pollute a stream, 142.

“Use of water,” 142. (See **USE OF WATER.**)

Light, 142. (See **LIGHT.**)

Actual enjoyment for full term required, 143.

Acquisition after user for less than the full term, 143.

The act does not affect prescription at common law, 144.

Except in cases of right to light, 144, 211.

And (*quære*) in cases of claims to other absolute and indefeasible rights, 144.

Legalization of user during an antecedent period of prescription, 145.

Section 5. — Occupiers of land may prescribe in their own names, 145.

Easements are nevertheless acquired for the owner in fee, 145.

PRESCRIPTION ACT — *continued.*

Rules for computing prescriptive periods, 146.

Section 4. — Prescriptive periods to be next before some suit or action, 146.

Not before an act in opposition to the easement, 147.

Meaning of *some* suit or action, 147.

User must be *next* before some suit or action, 148.

Intervening life estates to be excluded, 153.

No such rules for prescription at common law, 149.

No presumption to be made in the absence of proof of user, 149.

User presumed on proof of enjoyment before and after a period of intermission, 150.

Presumption of grant not prohibited when evidence of an actual grant exists, 151.

Section 7. — Exclusion from computation of periods of disability of persons interested in resisting, 152.

Section 8. — Exclusion from computation of tenancies for life and years in the servient tenement, 152.

“Other *convenient* watercourse,” in *section 8*, a mistake, 152.

Intervention of life estate: effect of *sections 4* and *7*, 153.

User to be continuous: effect of *sections 7* and *8*, 153.

When tenancies for life and years are not to be excluded under *section 8*, 154.

Prescriptive user the same in character at common law and under the act, 154.

See, also, **PRESCRIPTION; INTERRUPTIONS; “AS OF RIGHT.”**

PRESUMPTION.

Of lost grant after long user, 111, 132.

User must have been as of right, 113. (See “**AS OF RIGHT.**”)

Prevented by ignorance of and incapacity to resist user, 113.

Grant not presumed solely from lapse of time, 114.

Surrounding circumstances to be considered, 114.

Prevented if user is by leave, or if the right is contested, 115.

Prescription depends upon possibility of presuming a grant, 132.

No presumption of user allowed by the Prescription Act, 149.

User presumed on proof of enjoyment before and after a period of intermission, 150.

Presumption of grant not prohibited when proof of an actual grant exists, 150, 151.

PRIVACY.

Rights to undisturbed privacy not recognized by law, 84.

Disturbance by opening windows, 32.

PRIVILEGE.

An easement is a privilege, 4.

Confers no interest in the soil, 5.

Same is true of public ways, 56.

Easement is a privilege *without profit*, 6, 7.

Right to take coal, and right to take *all* coal distinguished, 5.

Grant of *exclusive* use of land, 5.

PROFITS A PRENDRE.

Not easements, 7.

Rights to take fish, stone, and trees, 7.

Right to take water an easement and not a *profit à prendre*, 7.

Unless confined in a tank or vessel, 7.

Easement claimed under the Prescription Act to obtain a *profit à prendre*, 142.

PROSPECT.

Right to uninterrupted prospect not recognized by law, 79.

Covenant not to obstruct prospect binding on covenantor, 80.

Such covenants frequently run with the land, 81.

View of a shop window, 82.

PUBLIC NUISANCES, 381.**PUBLIC WAYS.**

Mere privileges to pass over land, 6.

Right of landowner to use the soil, 6.

Not easements, 9, 72.

Generally called easements in America, 10, 130.

Effect as regards the owner of the soil, 72.

Ways common to many persons not public, 75.

Public and private ways may coexist, 75, 485.

Repairs, if public and private ways coexist, 76 (*o*).

Obstruction of private way over a public road, 445.

Not affected by the Prescription Act, 138.

Right to alter place of access to a public way, 320.

Way impassable: right to walk on the adjoining soil, 340, 345.

Obstruction of a public way; remedy, 445.

Obstruction of a private way by an obstacle in a public road, 445.

PUBLIC-HOUSE SIGN.

Right to place sign opposite a house, 78 (*u*).

Right to maintain sign-board, 78 (*u*).

PURITY OF AIR, 29.

See **AIR**; **POLLUTION OF AIR.**

PURITY OF WATER, 67.

See **POLLUTION OF WATER**; **STREAMS.**

QUIET ENJOYMENT.

Covenant for quiet enjoyment, 202.

No grant of right to light and air implied from covenant, 202.

Effect of this covenant on a grant by general words, 399.

RAILROADS.

Interests acquired by, generally easements in America, 130.

So of turnpike, waterworks, and gas companies, 131.

RAILWAYS CLAUSES CONSOLIDATION ACT, 1845.

Effect of compulsory purchase of land on the natural right to support from minerals, 225, 421.

RELEASE.

Extinction of easements by release, 460, 478.

Release may be actual or presumed, 460.

Not presumed from non-user alone, 461.

When presumed on cessation of user, 462.

Cases in which non-user is the only evidence of release, 464.

When presumed after non-user for less than twenty years, 465, 478.

Release can only take place after an easement has been actually acquired, 466.

Temporary agreement to suspend user negatives presumption of release, 467.

So, also, substitution of new method of enjoyment for convenience, 467.

Right of *dominant* owners to release or abandon easements, 468.

REPAIR.

Right to repair a servient tenement, or the subject of an easement, 285, 346.

No obligation on the servient owner, 18, 285.

No right of action for neglect to repair a way, 443.

RESERVATION OF EASEMENTS.

Operation of a reservation of an easement on a sale of land, 108.

Implied grant of support on sale of land reserving the subsoil, 221.

Implied reservation on grant of subsoil reserving the surface land, 222.

RESISTANCE.

Incapacity of a servient owner to resist user prevents presumption of lost grant, 113.

Prescription Act: exclusion of periods of incapacity from prescriptive periods, 152.

Incapacity to resist user prevents prescription, 160.

The power to resist must be by reasonable means, 161.

Incapacity from ignorance of user, 165.

Quære: In cases of right to light, 215.

The law in America is the same, 165.

RESTORATION.

Of ancient lights in new buildings, 483.

REVERSIONER.

When the occupier of a dominant tenement can alone sue for disturbance, 358.

Cases in which a reversioner can sue, 359, 394, 444.

REVIVAL.

Easements and natural rights revive after suspension, 448, 475.

Easements extinguished cannot be revived, 475, 476.

Revival of easements extinguished by unity of seisin on re-partition of tenements, 476.

Proper words must be used in deed of partition, 476.

Revival of ways of necessity, 488.

RIGHTS.

Right to free passage of air, 28.

Right to purity of air, 29.

Right to pollute air an easement, 29.

Rights in connection with air, 28.

Right to support by implied grant, 227.

Right to support by prescription, 229.

Right to divert a stream, 249.

Right to pen back the water of streams, 249.

RIGHTS — *continued*.

Right by appropriation to purity of artificial streams, 254.

Whaley v. Laing, 254.

Right to take water for use, 261.

Right to obstruct excessive user of easements, 281.

Right of freedom from disturbance, 354.

Right to sue in absence of actual damage, 357.

RIPARIAN.

"Riparian" land, owners, proprietors, and rights, 52.

Riparian rights incident to the whole of a riparian estate, 52.

Assignment of riparian rights by a riparian proprietor, 53, 310.

Riparian rights incident to an estate in its riparian character, 50, 438.

Partition of a riparian estate, 53, 310.

Rights and obligations of riparian owners at the source of a stream, 54.

No riparian rights unless the course of a stream is defined and known, 54.

Underground streams, 55.

Riparian rights suspended on creation of easements, 53.

Grant of privilege of disturbing riparian rights, 56.

Riparian owners to sue for disturbance must prove injury in that character, 438.

RIVERS.

Right to defend land from floods, 59.

Injury to neighbors therefrom, 59 (*s*).

Tidal rivers different from the sea, 60.

See, also, STREAMS.

SALE.

Of house and land simultaneously, 192.

The American doctrine, 192-199.

Four different views, 192.

Story v. Odin, 192.

Robeson v. Pittenger, 193.

The New York doctrine, 197.

Mullen v. Stricker, 200.

SEA.

Flooding by the sea, 59.

Right to defend lands regardless of neighbors, 59.

Obligation to maintain sea-walls, 59, 60.

SEISIN, UNITY OF.

See UNITY OF OWNERSHIP.

SERVIENT OWNER.

Who is, 10.

Nature of the obligation on a servient owner, 17.

Being incapable of resisting user, there is no prescription, 160.

Incapacity of, to make a grant rebuts prescription, 162.

SERVIENT TENEMENT.

What is, 11.

Must be distinct property from the dominant tenement, 11.

No easement can be acquired for benefit of the servient tenement, 16.

SEVERANCE OF LAND.

See PARTITION OF LAND.

SHOP WINDOWS.

Uninterrupted view of shop windows, 78.

Implied covenant not to obstruct, 79.

Right to unobstructed light for display of goods in a window, 216.

SHORING UP BUILDINGS.

Obligation to shore when removing adjoining buildings, 43, 44.

SMOKE.

Right to convey smoke up another person's chimney, 78 (*u*).

SPRINGS.

Rights and obligations as to the water of springs, 52.

STATUTE.

Grant under, an immediate or conditional, 129.

STONE.

Right to take stones a *profit à prendre*, 7.

STREAMS.

Natural and artificial streams defined and distinguished, 48.

Water from a natural source in a natural course, 48.

Water from a natural source in an artificial course, 48.

Water flowing by artificial means into a natural stream, 51.

Natural rights in natural streams, 51.

Easements in streams, 51.

No natural rights in artificial streams, 52.

Easements in both natural and artificial streams, 52.

Riparian rights incident to the whole of a riparian estate, 52.

Partition of a riparian estate, 53.

STREAMS — *continued.*

- Assignment of riparian rights by a riparian proprietor, 53, 310.
- Intermittent streams, 53.
- Rights and obligations of a riparian owner at the source of a natural stream, 54.
- No riparian rights or easements unless the course of a stream is defined and known, 54, 58, 240, 247.
 - Rights in underground streams, 54, 247.
- 1. Rights which have relation to the flow of streams, 55.
 - Natural rights to uninterrupted flow, 56.
 - Rights to divert, consume, or obstruct the flow, or to pen back the water, easements, 56, 57.
 - Natural right altered by easements, 56.
 - Right to have water diverted by another person, 58.
 - Right to divert flood water, 59.
 - Protection of land from the flow of the sea, 59.
 - Obligation to maintain sea-walls, 59.
 - Tidal rivers, 60.
 - Right to send water over land, 61.
 - Obligation to continue sending such water, 61.
 - Limit of natural rights to the use and to the flow of water, 296.
 - Underground streams, 61.
 - Difference between water percolating and defined streams, 247.
 - No right to water in undefined streams, 58, 247.
 - Except by grant, 247.
 - Surface streams supported by underground water, 40, 66, 67.
 - The law as to *surface* water in America, 241, 242.
 - Diminution of stream by drainage, 40, 66, 67.
- 2. Rights which have relation to purity of streams, 67, 253.
(See POLLUTION OF WATER.)
- 3. Right to take water for use, 69. (See USE OF WATER.)
- Acquisition of water rights, 240.
 - By grant, 240.
 - By prescription, 240.
- Artificial streams; when prescriptive rights to uninterrupted flow can be acquired, 242.
 - Temporary and permanent streams, 243.

STREAMS — *continued*.

No prescriptive right against originator of a temporary artificial stream, 244.

May be acquired against other persons, 244.

Prescriptive right in permanent artificial streams, 247.

Acquisition of right to divert streams, 249.

Acquisition of right to obstruct and pen back the water of streams, 249.

Appropriation of water of streams ; effect as to acquisition of easements. (See APPROPRIATION OF WATER, 251.)

Prescriptive right to divert part of the water of a stream, 302.

Extent of prescription to flow, 302.

The law in America, 303.

Cowell *v.* Thayer, 303, 304, 305.

Partition of riparian land ; effect on riparian rights, 53, 310.

Disturbance of water rights, 422.

Damage essential for right to sue for diversion or obstruction, 423.

Injury to the right to the flow sufficient damage to support an action, 424.

The American law, 425.

Water diverted from a stream but returned thereto, 426.

Obligation to keep a stream free from obstruction, 427.

Obstruction before the possession of a person who sues, 427.

Right to sue for continuing an obstruction, 427.

The law in America, 428.

Right to abate an obstruction, 429.

Disturbance of the steady flow of a stream, 429.

See, also, POLLUTION OF WATER ; USE OF WATER.

SUBJACENT SUPPORT.

Natural right to subjacent support for land, 34.

See, also, SUPPORT.

SUBORDINATE EASEMENTS, 25.

See EASEMENT.

SUBSTITUTION of new stream of light in a different direction, 386.

SUBTERRANEAN STREAMS, 41, 61, 63, 226, 247.

SUIT.

See ACTION.

SUPPORT.

Natural right to adjacent and subjacent support, 34, 220.

SUPPORT — *continued.*

Not in respect to buildings on the land, 34.

Nature of the natural right to support, 34.

Does not depend upon the quality of the soil, 35.

What is adjacent land, 36.

Result if destruction of support is inevitable when working mines, 36, 293.

Deprivation of the right by statute, 37.

Burden cannot be suddenly increased, 38.

Easements of support, 220.

Effect of compulsory purchase of land under the Railways
Clauses Act, 1845, 225, 421.

Effect on natural right of building houses, 38, 409.

Effect of excavating subsoil, 38, 43.

Support for land from underground water not a natural right,
39.

Such right may be acquired by grant though not by pre-
scription, 226.

Support for surface water from underground water, 40.

Support for buildings not a natural right, 41.

Such right may be acquired, 41, 227.

Right to deprive land of support an easement, 43, 44.

The effect of contiguity of buildings, 43.

Quære: Whether right to support is an easement within
the meaning of the Prescription Act, 140.

Acquisition of rights to support, 221.

Implied grant on severance of land and the subsoil by
sale, 221.

Implied reservation on grant of subsoil reserving the sur-
face, 222.

Mining leases, 223.

Right to deprive land of support not acquired by custom
or prescription, 224.

Grant of such right by copyholder, void, 224, 225.

Right to support for buildings acquired by implied grant,
227.

Right to support for buildings from land by prescription,
229.

Effect of excavation under buildings, 229, 230.

How can a grant be presumed, 230.

No prescriptive right for support of buildings in America,
231, 232, 233.

SUPPORT — *continued.*

No right to support for buildings from buildings by prescription, 236.

Natural right to support is unlimited, 292.

Modification by agreement, 294.

Mining leases, 223.

Limited right to support for buildings if support for land is limited, 294.

Obligation to repair a supporting building, 294.

Right to such repair, 294, 295.

Right to sue for disturbance of natural right, 409.

Effect on right to sue of the erection of buildings, 409.

The American law, 410.

Thurston v. Hancock, 411, 412.

Damage to newly-erected buildings, 413.

Right to sue for disturbance of support to buildings, 413.

Effect on right to sue of increasing the weight of buildings, 414.

Right to sue a wrong-doer for removal of support, 415.

No right of action for destroying support till damage occurs, 416.

Time to sue if it is limited from the commission of an act, 420, 421.

Effect on rights to support of imposing additional weights, 484.

SURFACE WATER, 66, 243.

Right to obstruct or detain, 39, 66.

SUSPENSION.

When suspension of user does not prevent prescription, 178.

Easements and natural rights temporarily suspended, 447.

Revival after suspension, 475, 476.

TEMPORARY ARTIFICIAL STREAMS.

Prescriptive rights in, 244.

Arkwright v. Gell, leading case, 244, 245.

TENANT.

Grant by one to another, 93.

Tenant cannot acquire an easement against landlord, 12.

Tenants may acquire easements as against each other, 13.

TERMS OF YEARS.

Easements may be granted for a term of years, 96.

Cannot be so acquired by prescription, 96.

TERMS OF YEARS — *continued.*

Exclusion of terms of years in computing prescriptive periods,
152.

TETHERING HORSES.

Right to tether horses for pasturage, 78 (*u*).

TIDAL RIVERS.

See RIVERS.

TIME.

Acquisition of easements for a limited time, 96.

Twenty years' user raises presumption of grant, 111–115.

"Time whereof the memory of man runneth not to the contrary," 132.

Immemorial usage, 132.

Presumption after twenty years' user, 132.

Prescription Act, 136. (See PRESCRIPTION ACT.)

Mode of computing prescriptive periods, 146–154.

TRANSFER.

Transfer of easements on conveyance of dominant tenement,
96, 97.

Express grant by particular description, 97.

Express grant by general words, 97.

"Appurtenances," 98, 283.

Easements "used and enjoyed," 103.

Natural rights pass without mention, 283.

Easements only assignable by deed, 283.

Tenancies created without deed; do easements pass? 283.

Assignment of riparian rights, 310.

Easements not assignable apart from their dominant tenements,
321.

Not universally true in America, 10.

TREES.

Right to cut and carry away a *profit à prendre*, 7.

TRESPASS.

Trespass by user during prescriptive period legalized when an
easement is acquired, 145.

TRIFLING and accidental interruptions, 178.

UNDERGROUND WATER.

No right to support for land from upward pressure, 41, 226.

Destruction of support by drainage, 41, 227.

Flow of underground water, 61.

UNDERGROUND WATER — *continued.*

Right to support for surface water, 63.

In America no action lies for cutting off underground water, 65.

Unless running in known and defined channels, 65.

Diminution of stream by drainage, 41, 63.

Laws relating to surface streams do not apply unless underground streams are defined and known, 65, 247.

Affecting surface streams, 66.

Pollution of underground water, 68.

Right to sue for pollution, 439.

See, also, **WELLS**.

UNDISTURBED PRIVACY, 84.**UNINTERRUPTED ENJOYMENT.**

See **INTERRUPTIONS**; **PRESCRIPTION**; **PRESCRIPTION ACT**.

UNINTERRUPTED FLOW OF WATER.

See **STREAMS**.

UNINTERRUPTED PASSAGE OF AIR.

See **AIR**.

UNINTERRUPTED PROSPECT.

See **PROSPECT**.

UNITY OF OWNERSHIP.

Dominant and servient tenements must be distinct properties, 10.

Prevents acquisition of easements by prescription, 177.

Extinction of easements by unity of seisin, 457.

Necessity for unity of seisin, 458.

Unity of *ownership* alone causes suspension, 459.

Necessity for unity of seisin for estates in fee simple, 459.

Unity of possession and enjoyment not necessary, 460.

UNOBSTRUCTED, right to have light and air, 33.**"USED AND ENJOYED."**

Conveyance of part of an estate with easements "used and enjoyed," 103.

Easements which existed before unity of ownership pass, 103.

Quasi-easements first used during unity of ownership, *quære*, 102.

USE OF WATER.

Right to take water for use, an easement, not a *profit à prendre*, 7, 69.

USE OF WATER — *continued.*

Natural right of riparian proprietors, 56, 71.

Limit of that right, 70, 296.

Natural right only while water is on the taker's land, 70.

Difference between the right to take standing and flowing water, 70.

Right to take water on another's land an easement, 70.

Right to take water from artificial streams, 261.

Acquisition of right to take water, 262.

Prescription Act, *section 2*, 137.

Use, in exercise of natural right, must be reasonable, 296.

Supplying a gaol or lunatic asylum, 296.

Ordinary and extraordinary use, 297.

Use for purposes of utility only, 302.

Irrigation of land, 300.

Irrigation in America, 301.

Use for manufacturing purposes, 302.

Disturbance of right to take water for use, 432.

When an action will lie, 432.

Disturbance of use by pollution, 434. (See POLLUTION OF WATER.)

USER.

In prescription, must be as of right, 113.

Ignorance of or incapacity to resist user rebuts presumption of a grant, 113.

Surrounding facts to be considered, 114.

See NON-USER.

USER, MODE OF.

See MODE OF USER.

VIEW.

See PROSPECT.

VOID.

Grant to be "void" conditionally, 109.

VOLUNTARY cessation of user, 179.

WATER.

Right to take water an easement not a *profit à prendre*, 7.

Water compared with light and air, 31.

Artificial supply to natural stream, 51.

Support for land from underground water, 40, 226.

WATER — *continued.*

- Water in a natural course, 48.
- Support for surface water from underground water, 40.
- Natural and artificial streams, 51.
- Easements which can exist in connection with water, 48, 56.
- In an artificial course, 48.
 - Flow of water, 56.
 - Purity of water, 67.
- Purity of water trickling over land, or percolating through the soil, 68.
 - Use of water for consumption, 70.
- Water collected in a well, 64, 252.
 - Springs, 50.
- Water oozing through land and collecting on surface, 51, 243.
- No separate ownership or property in water, 57, 64.
- Rights to pollute water, 68.
- Right to take water for use, 69.
- Natural right to use water, 69.
- Limit of natural right to use and consume water, 70.
- Nature of the right to take water, 70.
- Floods: right to protect lands, 59.
- The sea: right to protect lands, 59, 60.
- Tidal rivers: right to protect lands, 60.
- Right to send water over land, 61, 250.
 - Obligation to continue sending such water, 58, 251.
- Underground water, 61.
 - Difference between water percolating and defined streams, 58.
 - Underground water affecting surface streams, 61.
- Water collected in wells, 64, 252.
 - No wrong if water is made to escape, 64, 253.
- Disturbance of rights in water, 422.
- The American law, 425, 426.
- See, also, **STREAMS**; **POLLUTION OF WATER**; **USE OF WATER**;
- RIPARIAN.**

WATERCOURSE.

- Meaning of the word "watercourse," 142.
- Used in the Prescription Act, 137.
- What rights are included in the expression, 142.
- Disturbance of a watercourse; plaintiff's own wrong, 443.
- See, also, **STREAMS**; **POLLUTION OF WATER**; **USE OF WATER**;
- POURING WATER OVER LAND.**

WAYS.

- Owner of right of way cannot prevent other persons passing, 5.
- Public rights of way not easements, 8, 72.
- Generally considered so in America, 10.
- Ways of necessity, 25, 76.
 - Not given in every case of inaccessibility, 76, 77.
- Public and private ways, 72.
- No natural rights of way, 72.
- When easements, 72.
- Effects as regards the owner of the soil, 73.
- Coexisting rights of way, 75.
- Public and private ways may coexist, 75.
- Public way over existing private way, 75.
- Private way cannot be acquired over public road, 75.
- Private way not necessarily extinguished by public way, 76, 485.
- Repairs if public way made over a private road, 76 (*o*).
- General or limited, 77, 314.
- Prescription Act, 136.
- Acquisition of rights of way, 263.
 - Private right not acquired by dedication, 263.
 - Grants by general words, 263. (See GENERAL WORDS.)
 - Ways shown in plans of property conveyed, 264.
 - The American rule and doctrine, 265.
 - Acquisition of ways of necessity, 266.
 - The American law is the same, 269.
 - Acquisition by statute in some American States, 272, 273.
 - Only when no other way exists, 268.
 - Only when a grant can be presumed, 268.
 - No right gained on acquisition of land by escheat, 269.
- Grant subject to a right of ploughing, 314 (*c*).
- Measure of right granted by deed, 314.
- Measure of right acquired by prescription, 316.
- Ways of necessity coextensive with necessity, 319, 486.
- Alteration of place of access to a way, 320.
- User in connection with the dominant tenement alone lawful, 321.
- Cannot be assigned and made rights in gross, 321.
- Not universally true in America, 10.
- Right to build over ways, 329.

WAYS — *continued.*

- Who entitled to use a way, 324.
- User to dominant tenement, and thence beyond unlawful, 324.
 - Mere colorable use of dominant tenement, 324.
 - Way of leading to a highway, 328.
 - The law in America, 329, 330.
- Decreasing the width of private ways, 332.
- Gates and bars on private ways, 330, 331.
- Distribution of right on partition of dominant tenement, 337.
- Not universally true in America, 10.
- Way becoming impassable ; right to deviate, 340.
 - Way periodically interrupted, 340.
 - Temporary interruption from extraordinary cause, 341.
 - Destruction of road, 341.
 - Want of repair, 342.
 - Obstruction by grantor, 345.
- Right to repair ways, 346.
- Direction of ways, 346.
- Direction of ways of necessity, 348.
 - Direction cannot be varied, 350.
- Grant for continuing purpose ; variation of mode of user, 351.
 - Right to apply modern inventions, 351.
- Power to make ways to be exercised reasonably, 352.
- When an action will lie for obstruction, 443.
 - Action by reversioner, 444.
 - Temporary obstructions, right to sue, 444.
- Obstruction of private way over a public road, 445.
- Obstruction of private way by an obstacle in a public road, 446.
- Ways of necessity cease with the necessity, 486.
- Extinction on union of seisin, 488.
- Revival on severance, 488.
- Ways becoming inaccessible ; extinction of right, 491.
- See, also, **PUBLIC WAYS.**

WELLS.

- No right to uninterrupted supply of water, 64, 252.
- Water collected in a well, 7, 64, 252.
- Property in water collected in a well, 64, 252.
- No wrong if water is made to escape, 64, 254.

WIND.

- Uninterrupted flow of wind to a windmill, 138.

WINDMILL.

- Uninterrupted flow of wind, 138.

WINDOW.

Right to make new windows in buildings, 32.

Right to obstruct new windows, 32, 290.

Improving the condition of windows to obtain more light,
291.

Shop-windows ; light for display of goods, 216.

WORDS.

See GENERAL WORDS.

WRITING.

Grant by writing not under seal gives a license only, 3, 90.

Formerly deeds alone called *writings*, 3 (*d*).

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